

1-15-1996

Witnesses With Multiple Personality Disorder

Jacqueline R. Kanovitz

Bob S. Kanovitz

James P. Bloch

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/plr>



Part of the [Evidence Commons](#), and the [Psychology and Psychiatry Commons](#)

Recommended Citation

Jacqueline R. Kanovitz, Bob S. Kanovitz, and James P. Bloch *Witnesses With Multiple Personality Disorder*, 23 Pepp. L. Rev. 2 (1996)
Available at: <http://digitalcommons.pepperdine.edu/plr/vol23/iss2/1>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

Witnesses With Multiple Personality Disorder

Jacqueline R. Kanovitz*

Bob S. Kanovitz**

James P. Bloch***

TABLE OF CONTENTS

INTRODUCTION	388
I. FROM TRAUMA, DISSOCIATION, AND SPONTANEOUS SELF-HYPNOTISM TO MULTIPLE PERSONALITY DISORDER	399
II. HOW MULTIPLE PERSONALITY SYSTEMS FUNCTION	406
III. HOW DELUSIONS OF SEPARATENESS CAN DISTORT UNDERSTANDING OF AN OATH	409
IV. MEMORY COMPARTMENTALIZATION: THE PROBLEM OF CROSS-EXAMINING WITNESSES WITH MULTIPLE PERSONALITY DISORDER	415
V. HALLUCINATIONS, FLASHBACKS, AND OTHER CAUSES OF MEMORY DISTORTION	423
A. <i>Internal Foul Play</i>	424
B. <i>Confabulation</i>	426
C. <i>Hallucinations and Flashbacks</i>	426
VI. TESTIMONY BASED ON "RESTORED MEMORY"	430
VII. IMPACT OF TREATMENT HYPNOSIS ON TESTIMONIAL COMPETENCE	439
CONCLUSION	447

* J.D., Professor of Law, University of Louisville School of Law.

** M.D., Private Practice of Psychiatry.

*** Ph.D., Private Practice of Psychology.

INTRODUCTION

Sexual abuse is devastating for children. The psyche copes in various ways. One way is by walling off traumatic memories and blocking them from conscious recall.¹ Recognizing this, courts and legislatures in more than half the states now toll statutes of limitation on childhood sexual abuse until the victim is aware of the abuse and its psychological consequences in adult life.² These changes have been beneficial for

1. For a comprehensive treatment of the phenomenon of psychological forgetting, see JEROME L. SINGER, *REPRESSION AND DISSOCIATION: IMPLICATIONS FOR PERSONALITY THEORY, PSYCHOPATHOLOGY, AND HEALTH* (Jerome L. Singer ed., 1990). At various points, this Article will address relevant clinical features associated with multiple personality disorder (MPD). For ease of reference, the authors will, to the extent possible, refer to the same primary text by Dr. Frank Putnam. See FRANK W. PUTNAM, *DIAGNOSIS AND TREATMENT OF MULTIPLE PERSONALITY DISORDER* (1989). Dr. Putnam heads the National Institute of Mental Health's Dissociative Disorders Unit and is recognized as one of the leading authorities on MPD. His book is based on research done in conjunction with a National Institute of Mental Health (NIMH) study of 100 patients with MPD.

2. Legislatures in 23 states have adopted statutes postponing accrual of childhood sexual abuse tort actions until the victim discovers the abusive acts and their psychological consequences in adult life. See ALASKA STAT. § 9.10.140(b)(1)-(2) (1991); ARK. CODE ANN. § 16-56-130 (Michie 1993); CAL. CIV. PROC. CODE § 340.1 (West Supp. 1995); CONN. GEN. STAT. ANN. § 52-577d (West 1991); ILL. ANN. STAT. ch. 110, para. 13-202.2 (Smith-Hurd 1993 & Supp. 1994); IOWA CODE ANN. § 614.8A (West Supp. 1994); KAN. STAT. ANN. § 60-523 (1993); ME. REV. STAT. ANN. tit. 15, § 752-C (West Supp. 1995); MASS. GEN. LAWS ANN. ch. 260, § 4c (West Supp. 1994); MINN. STAT. ANN. § 541.073 (West Supp. 1994); MO. ANN. STAT. § 537.046 (Vernon Supp. 1994); MONT. CODE ANN. § 27-2-216 (1991); NEV. REV. STAT. § 11.215 (1991); N.J. STAT. ANN. § 2A:61B-1 (West Supp. 1994); N.M. STAT. ANN. § 37-1-30 (Michie 1993); OKLA. STAT. ANN. tit. 12, § 95 (West Supp. 1994); OR. REV. STAT. § 12.117 (1993); R.I. GEN. LAWS § 9-1-51 (Supp. 1994); S.D. CODIFIED LAWS ANN. § 26-10-25 (1992); UTAH CODE ANN. § 78-12-25.1 (Supp. 1992); VT. STAT. ANN. tit. 12, §§ 522, 560 (Supp. 1993); VA. CODE ANN. § 8.01-249(6) (Michie 1994); WASH. REV. CODE § 4.16.340 (Supp. 1992).

Courts in 10 jurisdictions have adopted similar reforms without the aid of legislation. See *Farris v. Compton*, 652 A.2d 49, 63 (D.C. 1994); *Fager v. Hundt*, 610 N.E.2d 246, 253 (Ind. 1993); *Wimberly v. Gatch*, 635 So. 2d 206, 218 (La. 1994); *Meiers-Post v. Schafer*, 427 N.W.2d 606, 610 (Mich. Ct. App. 1988); *Leonard v. England*, 445 S.E.2d 50, 52 (N.C. Ct. App. 1994); *Osland v. Osland*, 442 N.W.2d 907, 909 (N.D. 1989); *McCollum v. D'Arcy*, 638 A.2d 797, 800 (N.H. 1994); *Ault v. Jasko*, 637 N.E.2d 870, 875 (Ohio 1994); *Vesecky v. Vesecky*, 880 S.W.2d 804, 807 (Tex. Ct. App. 1994); *Hammer v. Hammer*, 418 N.W.2d 23, 27 (Wis. Ct. App. 1987). For a discussion of these changes, see generally Jacqueline R. Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L. REV. 1185, 1196-1202 (1992); Rosemarie Ferrante, Note, *The Discovery Rule: Allowing Adult Survivors of Childhood Sexual Abuse the Opportunity for Redress*, 61 BROOK. L. REV. 199 (1995); Gary Hood, Note, *The Statute of Limitations Barrier in Civil Suits Brought by Adult Survivors of Child Sexual Abuse: A Simple Solution*, 1994 U. ILL. L. REV. 417 (1994); Jessica E. Mindlin, Comment, *Child Sexual Abuse and Criminal Statutes of Limitations*, 65 WASH. L. REV. 189 (1990); Julie S. Silberg, Comment, *Memory Repression: Should It Toll the Statute-*

persons with multiple personality disorder (MPD). A large percentage of people with this disorder report histories of childhood sexual abuse.³

MPD is hardly a new diagnosis. What is new is the unprecedented rate at which this disorder is now being diagnosed. Studied by nineteenth century psychiatrists, MPD faded into professional obscurity from the 1920s until the early 1980s.⁴ This was the period when the theories of Sigmund Freud had a monopolistic hold on clinical

ry Limitations Period in Child Sexual Abuse Cases?, 39 WAYNE L. REV. 1589 (1993).

3. According to a NIMH study of 100 patients suffering from MPD, 97% percent provided histories of childhood abuses, with 68% reporting sexual abuse. PUTNAM, *supra* note 1, at 47. Findings from other published studies on the frequency of childhood sexual abuse in MPD patient populations have generally been consistent with or even higher than the NIMH study. See, e.g., Suzette Boon & Nel Draijer, *Multiple Personality Disorder in the Netherlands: A Clinical Investigation of 71 Patients*, 150 AM. J. PSYCHIATRY 489, 492 (1993); Philip M. Coons et al., *Multiple Personality Disorder: A Clinical Investigation of Fifty Cases*, 176 J. NERVOUS & MENTAL DISEASE 519, 525 (1988); Philip M. Coons et al., *Post-Traumatic Aspects of the Treatment of Victims of Sexual Abuse and Incest*, 12 PSYCHIATRIC CLINICS OF N. AM. 325, 326 (1989); Carol A. Glod, *Long-Term Consequences of Childhood Physical and Sexual Abuse*, 7 ARCHIVES PSYCHIATRIC NURSING 163, 165 (1993); Richard J. Lowenstein & Frank W. Putnam, *The Clinical Phenomenology of Males with MPD: A Report of 21 Cases*, 3 DISSOCIATION: PROGRESS IN THE DISSOCIATIVE DISORDERS 125, 139 (1990); see also Geri Anderson et al., *Dissociative Experiences and Disorders Among Women Who Identify Themselves as Sexual Abuse Survivors*, 17 CHILD ABUSE & NEGLECT 677 (1993). But see generally Fred H. Frankel, *Adult Reconstruction of Childhood Events in the Multiple Personality Literature*, 150 AM. J. PSYCHIATRY 954 (1993) (contending that published studies linking MPD to childhood sexual abuse are flawed and arguing that the link between childhood sexual abuse and MPD has not yet been scientifically established).

4. See, e.g., EUGENE L. BLISS, *MULTIPLE PERSONALITY, ALLIED DISORDERS, AND HYPNOSIS* 58-63 (1986); COLIN A. ROSS, *MULTIPLE PERSONALITY DISORDER: DIAGNOSIS, CLINICAL FEATURES, AND TREATMENT* 27-38 (1989) (reviewing the scientific study of dissociation during the 19th century). There are a number of case reports for the period between the late 1800s and the 1920s. See, e.g., PUTNAM, *supra* note 1, at 4-6, 29-31 (reviewing the decline and rise of interest in dissociation); Elizabeth S. Bowman, *Adolescent MPD in the Nineteenth and Early Twentieth Centuries*, 3 DISSOCIATION: PROGRESS IN THE DISSOCIATIVE DISORDERS 179 (1990) (analyzing six multiple personality cases reported between 1823 and 1926). Sigmund Freud was interested in multiple personality disorder during the early phase of his career. See, e.g., ROSS, *supra*, at 27-38. He later rejected the dissociative model of psychological forgetting, the infrastructure of MPD, in favor of his own model based on the dynamic unconscious. Freud's model attributed psychological forgetting to a mechanism he called "repression." Mainstream psychiatry embraced Freud's explanations and theories and ignored dissociative disorders for the next fifty years. See BLISS, *supra*, at 54-58; PUTNAM, *supra* note 1, at 31-36; ROSS, *supra*, at 6-7, 30-36, 44.

thought.⁵ Freud believed that incest memories were Oedipal fantasies that the patient confused for reality.⁶ The Oedipal fantasy theory diverted clinical attention from trauma-induced dissociative disorders until the early 1980s when this theory crumbled under the weight of empirical evidence that child molestation and incest is more prevalent than previously believed.⁷ The collapse of the fantasy theory reawakened interest in MPD and since then the numbers of diagnoses has risen rapidly.⁸

The growing popularity of the MPD diagnosis has divided the clinical community.⁹ Some experts claim that MPD is rare and is now being overdiagnosed,¹⁰ while others assert that it is reasonably common and

5. BLISS, *supra* note 4, at 54-58; PUTNAM, *supra* note 1, at 31-36; ROSS, *supra* note 4, at 6-7, 30-36, 44.

6. See also PUTNAM, *supra* note 1, at 31-34; JOHN BRIERE, THERAPY FOR ADULTS MOLESTED AS CHILDREN: BEYOND SURVIVAL 33-36 (1989).

7. For comments on the factors behind the contemporary reawakening of interest in MPD, see ROSS, *supra* note 4, at 44-54; Richard P. Kluft, *An Update on Multiple Personality Disorder*, 38 HOSP. & COMMUNITY PSYCHIATRY 363, 363-64 (1987) (explaining the growing interest in MPD); John G. Watkins, *The Bianchi (L.A. Hillside Strangler) Case: Sociopath or Multiple Personality*, 32 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 67, 73 (1984).

8. ROSS, *supra* note 4, at 37-44.

9. The *Diagnostic and Statistical Manual of Mental Disorders* observes:

The sharp rise in reported cases of Dissociative Identity Disorder [the new name for MPD] in the United States in recent years has been subject to very different interpretations. Some believe that the greater awareness of the diagnosis among mental health professionals has resulted in the identification of cases that were previously undiagnosed. In contrast, others believe that the syndrome has been overdiagnosed in individuals who are highly suggestible.

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 486 (4th ed. 1994) [hereinafter DSM-IV].

10. See, e.g., Paul F. Dell, *Professional Skepticism about Multiple Personality*, 176 J. NERVOUS & MENTAL DISORDER 528, 530 (1988) (reporting results of survey); Corbett H. Thigpen & Hervey M. Cleckley, *On the Incidence of Multiple Personality Disorder: A Brief Communication*, 32 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 63 (1984). The foremost critic of this diagnosis is an organization called the False Memory Syndrome Foundation. See generally Sandra G. Boodman, *Advocacy Group for 'Aggrieved' Parents Fight Back*, WASH. POST, Apr. 12, 1994, at Z15 (introducing background and purpose of the False Memory Syndrome Foundation) [hereinafter Boodman, *Advocacy Group*]; Sandra G. Boodman, *The Professional Debate over an Emotional Issue*, WASH. POST, Apr. 12, 1994, at Z13 (discussing different opinions regarding the validity of repressed memories) [hereinafter Boodman, *The Professional Debate*]. Members of the Foundation reject the theory that psychological mechanisms can suppress traumatic memories and attribute recovered memories of childhood sexual abuse to suggestive psychotherapy practices. See, e.g., Frankel, *supra* note 3, at 957-58; Elizabeth F. Loftus, *The Reality of Repressed Memories*, 48 AM. PSYCHOL. 518, at 526-33 (1993); Carol Gentry, *Are Secrets Locked Inside?*, ST. PETERSBURG TIMES, Mar. 6, 1994, at 1A; Sally Jacobs, *Sex Abuse, Memories in Question*, BOSTON GLOBE, Apr. 4, 1993, § 3, at

often overlooked.¹¹ Much about MPD remains controversial. Nonethe-

1; Amy Kuebelbeck, *False Memory Backlash is Coming Full Circle*, WICHITA EAGLE, Jan. 29, 1994, at 3E; Elizabeth F. Loftus, *You Must Remember This . . . or Do You? How Real Are Repressed Memories?*, WASH. POST, June 27, 1993, at C1; Jeanne Wright, *Recalling or Fabricating Past Abuse?*, L.A. TIMES, Aug. 5, 1994, at E1; see also *infra* notes 164, 169 and accompanying text. The Foundation's Scientific Advisory Board reads like the directory of Who's Who in Expert Witnesses for the Defense. See Boodman, *Advocacy Group, supra*, at Z15. The organization encourages bringing false memory lawsuits against therapists engaged in recovered memory treatment. See, e.g., *Sullivan v. Cheshier*, 846 F. Supp. 654, 654-57 (N.D. Ill. 1994) (involving suit by parent against therapist for creating false memories); Katy Butler, *Clashing Memories, Mixed Messages*, L.A. TIMES, June 26, 1994, at 12 (Magazine); Bill Scanlon, *Therapists Under Fire, Debate Brews: Do Some Counselors Brainwash Clients into Believing They Were Molested?*, ROCKY MOUNTAIN NEWS, Mar. 10, 1994, at 1D; Michael J. Grinfeld & Joseph F. Duffy, *Jury Awards Father \$500,000 in Recovered Memories Trial*, PSYCHIATRIC TIMES, June 1994, at 1; Virginia R. Knight, *Psychiatrist Sued over Methods: The Doctor Allegedly Prescribed Viewing 'Films of Sexual Degradation' as Part of the Treatment*, FRESNO BEE, June 30, 1993, at A6; Carol Ness & Stephanie Salter, *Therapists Unsettled by Memory Verdict*, S.F. EXAMINER, May 15, 1994, at A1; Bill Ordine, *Seeking Help and Finding Anguish to Some Ex-Clients, It's Therapy Gone Awry*, PHILA. INQUIRER, Feb. 27, 1994, at A1; *False-Memory Verdict Meant to Put Therapists on Notice*, ARIZ. REPUB., May 15, 1994, at A3. The Foundation has been highly effective in marketing its views. See, e.g., Eugene L. Meyer, *Poisoned Memories*, WASH. POST, May 27, 1994, at D1; Clark Morpew, *The Real Tragedy Is That the Cardinal Was Accused at All*, ST. PAUL PIONEER, Nov. 20, 1993, at 9C; Stephanie Salter, *She Accused Her Father, Took It Back, Imagined Incest: Woman Says Her Therapists Pushed Her to Believe in an 'Awful' Past That Never Was*, S.F. EXAMINER, April 6, 1993, at A1; Edward Walsh, *Man Who Accused Cardinal Bernardin of Sexual Abuse Drops Lawsuit*, WASH. POST, Mar. 1, 1994, at A3.

11. See, e.g., ROSS, *supra* note 4, at 90-93 (noting increase in MPD in urban North America). Studies of inpatient populations on acute psychiatric wards in state mental hospitals have shown high frequencies of MPD, ranging between 1% and 9%. See Lucy G. Quinby & Frank W. Putnam, *Dissociative Symptoms and Aggression in a State Mental Hospital*, 4 DISSOCIATION: PROGRESS IN THE DISSOCIATIVE DISORDERS 21, 21 (1991); see also Eugene L. Bliss & E. Alan Jeppsen, *Prevalence of Multiple Personality Among Inpatients and Outpatients*, 142 AM. J. PSYCHIATRY 250, 251 (1985); Colin A. Ross et al., *The Frequency of Multiple Personality Disorder Among Psychiatric Inpatients*, 148 AM. J. PSYCHIATRY 1717 (1991). Outpatient population studies have also shown significant rates of occurrence. See Colin A. Ross, *Epidemiology of Multiple Personality Disorder and Dissociation*, 14 PSYCHIATRIC CLINICS OF N. AM. 503, 506, 511 (1991). These outpatient studies report percentages as high as 15% in studies involving sexually abused patients. See Donald W. Schafer, *Recognizing Multiple Personality Patients*, 40 AM. J. PSYCHOTHERAPY 500, 502 (1986). Prison population studies lend further support to the belief MPD is far from rare. See Eugene L. Bliss & Ester M. Larson, *Sexual Criminality and Hypnotizability*, 173 J. NERVOUS & MENTAL DISEASE 522 (1985); see also Dorothy O. Lewis & Jennifer S. Bard, *Multiple Personality and Forensic Issues*, 14 PSYCHIATRIC CLINICS OF N. AM. 741, 755 (1991); Jiri Modestin,

less, three things are clear: witnesses carrying this diagnosis are now appearing in courtrooms around the country,¹² these witnesses are markedly different from other witnesses,¹³ and lawyers and judges

Multiple Personality Disorder in Switzerland, 149 AM. J. PSYCHIATRY 88 (1992); Elyn R. Saks, *Does Multiple Personality Disorder Exist? The Beliefs, the Data, and the Law*, 17 INT'L J.L. & PSYCHIATRY 43, 45-70 (1994).

12. See, e.g., Bill Romano, *Multiple Personalities Testify in Abuse Trial*, SAN JOSE MERCURY NEWS, Nov. 15, 1993, at 1B; Janny Scott, *Disorder in the Court: When Mental Illness Meets the Law—Multiple Personality Defendants Pose Daunting Challenges*, STAR TRIB. (Minneapolis-St. Paul), May 10, 1994, at 4A. Most of the suits have involved allegations of sexual abuse, usually against primary childhood caretakers. See, e.g., *State v. Donnelly*, 798 P.2d 89, 90 (Mont. 1990) (involving sexual abuse by step-father), *overruled on other grounds by State v. Imlay*, 813 P.2d 979 (Mont. 1991); *Abuse Memories—True or False?*, ORLANDO SENTINEL, Apr. 19, 1993, at A1; Alan J. Craver, *Multiple Personality Girl Testifies Against Father: Harford Judge is Told of Years of Sex Abuse*, BALT. MORNING SUN, Feb. 13, 1992, at 1C; Gay Elwell, *Jury Deadlocks in Sex Abuse Case*, MORNING CALL (Allentown, Pa.), Sept. 15, 1994, at B5; Eugene L. Meyer, *Mistrial Called in Sexual Abuse Case of Daughter with Personality Disorder*, WASH. POST, Aug. 27, 1993, at D6 [hereinafter *Mistrial*]; Eugene L. Meyer, *Woman with Multiple Personality Testifies in Abuse Trial*, WASH. POST, Aug. 21, 1993, at D1 [hereinafter *Woman*]. In addition to primary caretakers, therapists, high school counselors, priests, and others, have also been sued. See, e.g., *College Hosp., Inc. v. Superior Court*, 16 Cal. Rptr. 2d 833, 834 (Cal. Ct. App. 1993) (therapist), *rev'd*, 882 P.2d 894 (1994); *Dorsey v. State*, 426 S.E.2d 224, 226 (Ga. Ct. App. 1992) (high school counselor); *Lovelace v. Keohane*, 831 P.2d 624, 626 (Okla. 1992) (priest); *Birkner v. Flowers*, 771 P.2d 1053, 1055 (Utah 1989) (social worker in mental hospital). The suits often involve bizarre twists or come to surprise endings. See, e.g., Charles Babington, *The Uncivil Suit in Montgomery County, A Strange Sexual Harassment Case Finally Goes to Trial*, WASH. POST, Jan. 6, 1992, at C1; Jane Harper, *Trial Takes Twist with Multiple Personalities*, HOUSTON POST, Sept. 13, 1992, at A1; Knight, *supra* note 10, at A6; *Mistrial*, *supra* at D6; Bill Rankin, *A Case of Multiple Personalities: A Shattered Victim Sentencing this Week in Bizarre Rape Case*, ATLANTIC CONST., June 7, 1992, at D1; Lisa Popyk, *Woman With Mental Disorder Accuses Driver of Sexual Assault*, CIN. POST, Oct. 5, 1994, at 9A; Salter, *supra* note 10, at A1; *Woman Alleges 10 Personalities, Sexual Attack*, COLUMBUS DISPATCH, Oct. 6, 1994, at C6.

Several trials have involved accusations of satanic ritual abuse (SRA). See, e.g., Henry Chu, *Suit Claiming Satanic Abuse Nearing the Jury*, L.A. TIMES, Apr. 11, 1991, at B7; Sonni Efron & Henry Chu, *Jury Splits Verdict in Cult Trial*, L.A. TIMES, Apr. 13, 1991, at A1; Sonni Efron, *Witness Denies Defense Allegation in Cult Case*, L.A. TIMES, Apr. 2, 1991, at B8; Diane Klein, *Plaintiffs Speak the Unspeakable*, L.A. TIMES, Apr. 4, 1991, at E1. This is not surprising since a large percentage of patients with this disorder believe they were satanically abused in childhood. See, e.g., Richard P. Kluft, *Phenomenology and Treatment of Extremely Complex Multiple Personality Disorder*, 1 DISSOCIATION: PROGRESS IN THE DISSOCIATIVE DISORDERS 47, 50 (1989); Sonni Efron, *Expert Tells of Finding Some Physical Signs of Satanic Child Abuse*, L.A. TIMES, Apr. 3, 1991, at B1; Larry Witham, *Satanic Ritual Abuse: Modern Horror or Hoax? Credibility of 'Survivors' Is Under Attack*, WASH. POST, June 15, 1994, at A9.

13. The appearance of multiples on the witness stand raises a number of novel and complex medico-legal issues. How many oaths are necessary? "Who" should the

have no idea what to make of them.¹⁴

The advent of witnesses with this disorder began five years ago in Oshkosh, Wisconsin, when a young woman, identified only as "Sarah," told a jury how Mark Peterson, a man she barely knew, had taken sexual advantage of her by seducing "Jennifer," a naive and compliant part of her personality.¹⁵ Sarah had somewhere between eighteen and forty-six personality states. Six emerged to testify.¹⁶ The chaos inside Sarah's mind dominated the trial. The judge administered new oaths and made new introductions each time Sarah switched.¹⁷ As "Franny," Sarah related how she and three others, "John," "Jammie," and "Jennifer," had gone fishing the night she met the accused. As "Jennifer," Sarah described how the accused enticed her into "coming out" and seduced her. As mischievous six-year-old "Emily," Sarah vouched for Jennifer's testimony, confessing that she had been curious about what was going on and had "peeked" during the sexual encoun-

judge evaluate for competency and when should this evaluation take place? *See infra* part III. How does an attorney cross-examine a witness with a dissociatively compartmentalized mind? *See infra* part IV. Can this disorder impact a multiple's perception and recall? *See infra* part V. Can psychotherapy alter a multiple's memory? *See infra* parts VI, VII.

14. For some of the issues courts are now struggling with, see *Dorsey*, 426 S.E.2d at 224, and *Thornton v. State*, 653 N.E.2d 493 (Ind. Ct. App. 1995). In *Dorsey*, the court was asked to decide: (1) whether a trial judge should determine a multiple's testimonial competence based on an evaluation of the witness's whole personality before the start of the testimony or separately as to each alter as and when it emerges and (2) whether a witness who needs to enter an altered state of consciousness to remember what happened is competent to testify. *Dorsey*, 426 S.E.2d at 226-29; *see also* Scott, *supra* note 12, at 4A (surveying current trends and developments in the criminal field in cases involving multiples). In *Thornton*, the court considered a challenge to testimonial competence based on the witness having undergone memory integration therapy. *Thornton*, 653 N.E.2d at 496.

15. For a legal analysis of this trial, see generally Joann Ondrovik & David Hamilton, *Credibility of Victims Diagnosed as Multiple Personality: A Case Study*, 9 AM. J. FORENSIC PSYCHOL. 13 (1991).

16. For media accounts of this trial, see Carol J. Castaneda, *Multiple-Personality Case: Guilty*, USA TODAY, Nov. 9, 1990, at 3A; Cynthia Gorney, *Man Guilty in Multiple Personality Rape Case*, WASH. POST, Nov. 9, 1990, at C1; Cynthia Gorney, *Sarah's Story: Voices from a Fractured Past—Wisconsin Woman Describes the Origin of Her Selves*, WASH. POST, Nov. 10, 1990, at D1; Robert Imrie, *Woman's Illness is a Roadblock in Oshkosh Trial*, ST. PAUL PIONEER PRESS, Aug. 17, 1990, at 1E; *Man Guilty in Sex Assault on Woman with 46 Identities*, L.A. TIMES, Nov. 9, 1990, at A20; Desda Moss, *Personalities Case is Closed*, USA TODAY, Dec. 20, 1990, at 2A; *Multiple-Personalities Case Retrial Ordered*, WASH. POST, Dec. 18, 1990, at B1.

17. *See supra* note 16 (listing media accounts of the trial).

ter. Spectators fought for seats and watched with curious amazement as Sarah switched identities. The jury found Mark Peterson guilty, but the judge set the verdict aside and ordered a new trial.¹⁸ The case was never retried.¹⁹

Witnesses like Sarah are now appearing in other American courtrooms.²⁰ Their presence is a natural consequence of the increased use of the MPD diagnosis. However, this is not the only factor at work. For many multiples, life is a series of calamities beginning in early childhood²¹ and continuing into adult life.²² Memory compartmentalization

18. The judge's ostensible reason for ordering a new trial was that the defense had not properly pursued its request for a compulsory psychological examination of the victim. See *Multiple Personalities Case Retrial Ordered*, *supra* note 16, at B1. Shortly before the judge set the verdict aside, however, a key prosecution witness publicly admitted that he had been sexually involved with Sarah. See *New Questions Raised in Wisconsin Rape Case*, CHI. TRIB., Nov. 25, 1990, at C3. Whether this admission played a role in the judge's decision to order a new trial is unclear.

19. The prosecution requested a dismissal because Sarah was too fragile to withstand the ordeal of a second trial. See *No Retrial of Man in Wisconsin Rape*, N.Y. TIMES, Dec. 20, 1990, at B17. The trial took its toll on Sarah; she is now reputed to have 72 personalities and spends much of her life in state mental hospitals. See Cathryn Creno, *Disorder Splits Her into 72 Personalities: Experts Debate Whether Illness Is a Fad or Real*, ARIZ. REPUBLIC, July 10, 1992, at B1; *Woman With Multiple Personality Disorder Continues Care Outside Institution*, ST. PAUL PIONEER PRESS, Feb. 25, 1993, at 2C. The prosecutor has been accused of bringing this case to trial for political gain. See ArLynn L. Presser, *Publicity and Justice: Rape Conviction Overturned Amid Allegations of Prosecutorial Impropriety*, 77 A.B.A. J., Apr. 1991, at 20.

20. See *supra* note 12 and accompanying text.

21. The overwhelming majority of patients diagnosed with MPD provide histories of severe abuse in childhood. PUTNAM, *supra* note 1, at 45-54. In the NIMH study of 100 patients, 97% reported being abused. *Id.* Sexual abuse was the type of abuse most often mentioned and was reported by 68% of the patients. *Id.* at 47. Findings of high incidents of abuse are standard across all published studies. See *supra* note 3.

22. Studies show that people who were sexually abused as children carry a much higher risk of being victimized as adults. PUTNAM, *supra* note 1, at 69-70; see, e.g., BRIERE, *supra* note 6, at 20-21; Richard P. Kluft, *Dissociation and Subsequent Vulnerability: A Preliminary Study*, 3 DISSOCIATION: PROGRESS IN THE DISSOCIATIVE DISORDERS 167, 167 (1990); Bessel A. van der Kolk, *The Compulsion to Repeat the Trauma, Re-enactment, Revictimization, and Masochism*, 12 PSYCHIATRIC CLINICS OF N. AM. 389, 391 (1989). More than half of the subjects in a NIMH study of 100 MPD patients reported being sexually assaulted or raped as adults. See PUTNAM, *supra* note 1, at 69. Studies show that incest victims are twice as likely as others to enter into physically violent marital relationships and to receive unwanted sexual advances from authority figures. See, e.g., van der Kolk, *supra*, at 391.

Several hypotheses have been offered to explain this tendency. Dr. Putnam views the tendency of multiples to enter into abusive relationships in adult life as an attempt to obtain belated mastery over the original trauma by unconsciously reenacting it. PUTNAM, *supra* note 1, at 178-80. Drs. Bloch and Kluft assert that dissociative memory barriers prevent multiples from recalling their past experiences and trans-

keeps crucial information out of awareness.²³ As a result, multiples are unable to learn from their prior experiences, fail to recognize danger signs, and are often victimized over and over again. Further, trauma takes its toll on memory; the more terrible the trauma, the more terrible the toll. And so it is with multiples.²⁴ Determining truth from a multiple's testimony, consequently, will not be easy for juries.²⁵

forming them into experiential learning. *Id.*; see JAMES P. BLOCH, ASSESSMENT AND TREATMENT OF MULTIPLE PERSONALITY DISORDER AND DISSOCIATIVE DISORDERS 5-7, 9-11 (1991); Kluff, *supra*, at 168-71; see also *infra* note 23. As a result, multiples do not recognize danger signs and have a tendency to repeat the same mistakes.

23. Psychological development depends upon the continuous "metabolism" of experience. Psychological metabolism is analogous to the digestive and metabolic processes by which a person takes in and utilizes chemical nutrients as fuel for the body. The process involves an organized sequence that starts with sensory registration of stimulus events and moves through perceptual/cognitive processing, association with stored information from other experiences, emotional response to the material, and learning via adjustment of prior expectations, responses, and behavioral repertoires. This associative, integrative psychological processing of experience leads to, among other results, the developmental elaboration of modulated, "mature" emotional states, the progressive resolution of old problems, and proceeding to new experience. Dissociated psychological functioning in childhood interferes with these processes, leaving significant gaps in organized memory. See BLOCH, *supra* note 22, at 5-7, 9-11.

24. See *infra* part V.

25. This Article is concerned with problems the legal system will face in adjusting to witnesses with MPD and does not address the related question of criminal trial competence. For a discussion of competency of multiples in criminal trials, see generally *Dusky v. United States*, 362 U.S. 402 (1960), and *Rock v. Arkansas*, 483 U.S. 44 (1987) (holding the right to testify in one's own behalf is protected by due process). MPD can hamper the defense of criminal charges in a number of different ways: the accused may have difficulty remembering the events surrounding the crime or recalling childhood experiences needed to substantiate insanity defenses and other pleas for leniency. Additionally, MPD can affect the accused's trust in his attorney, and his ability to maintain a continuous psychological presence during the trial and to perform other tasks necessary to his defense, such as giving effective testimony. See generally David B. Savitz, *The Legal Defense of Persons with the Diagnosis of Multiple Personality Disorder*, 3 DISSOCIATION: PROGRESS IN THE DISSOCIATIVE DISORDERS 195, 198-200 (1990) (examining factors to determine if the accused is competent to proceed); Sarah K. Fields, Note, *Multiple Personality Disorder and the Legal System*, 46 WASH. U. J. URB. & CONTEMP. L. 261, 280-81 (1994) (discussing the problems with MPD witnesses). Despite this serious range of potential impairments, judges have been slow to find multiples incompetent for trial. See, e.g., *State v. Badger*, 551 A.2d 207, 210 (N.J. Super. Ct. Law Div. 1988) (upholding trial competence even though defendant who suffered MPD could not recall the crime). The explanation perhaps lies in the long and uncertain treatment process that would be necessary to restore competence once its absence is acknowledged. There are no quick psychopharmacological cures for MPD. See, e.g., Richard J. Loewenstein, *Rational Psychopharmacology*

The main focus of legal discourse on MPD has centered on whether multiples should be regarded as singular or plural for legal purposes.²⁶ The clinical community has long since settled this debate for clinical purposes. Identities are not regarded as separate psychological persons.²⁷ While the clinical community's views on personhood do not bind the legal system, the legal system should not borrow trouble where none exists by recognizing more than one legal person per body. Continuing this debate is a waste of time when important issues need to be addressed. MPD is accompanied by clinical features that defy common assumptions about consciousness, memory and behavior. Workable solutions to MPD-related legal issues will need to take these clinical features into account. Instead of fighting over how many legal persons inhabit a multiple's body, legal investigators should seek to determine how this disorder is likely to impact a multiple's performance in various legal settings and what can be done to compensate.

This Article is written on the assumption that multiples are competent witnesses and that courts will receive their testimony. This assumption conforms with the modern philosophy of the Federal Rules of Evidence²⁸ and is the approach some courts are now taking.²⁹ Working

gy in the Treatment of Multiple Personality Disorder, 14 PSYCHIATRIC CLINICS OF N. AM. 721, 727 (1991). The only known treatment with any chances of success is intensive, long-term psychotherapy. Forensic hospitals are poorly equipped to provide this treatment. *Kort v. Carlson*, 723 P.2d 143, 149-50 (Colo. 1986) (en banc) (involving complaint by prisoner with MPD alleging ineffective treatment); *State v. Soutamire*, 602 So. 2d 564, 567-68 (Fla. Dist. Ct. App. 1992) (noting that particular hospitals may provide better treatment for MPD than others). Finding a multiple mentally incompetent for trial would often mean the charges would never come to trial.

26. Compare Elyn R. Saks, *Multiple Personality Disorder and Criminal Responsibility*, 25 U.C. DAVIS L. REV. 383 (1992) (arguing that alters are, in a philosophical sense, separate people) with Ralph Slovenko, *Commentary, The Multiple Personality: A Challenge to Legal Concepts*, 17 J. PSYCHIATRY & L. 681 (1989) (pointing out the mind-boggling problems that would arise from recognizing more than one legal person per body).

27. They are viewed within the clinical community as dissociated self-states that embody "highly stylized enactments of inner conflicts, drives, memories, and feelings." ROSS, *supra* note 4, at 109; see also *infra* notes 37, 61, 64, 75, 90 and accompanying text. Multiples experience their dissociated self-parts as separate, real people. This belief, however, has been called a delusion by some scholars. See, e.g., ROSS, *supra* note 4, at 109. Others identify the belief as a temporary psychosis. See, e.g., George G. Greaves, *A History of Multiple Personality Disorder*, in CLINICAL PERSPECTIVES ON MULTIPLE PERSONALITY DISORDER 355, 375 (Richard P. Kluft & Catherine G. Fine eds., 1993).

28. Rule 601 of the Federal Rules of Evidence eliminates mental qualifications for testifying. FED. R. EVID. 601. This conforms to the position advocated by Dean Wigmore who argued that clear lines do not exist between mental disorders that ought to disqualify and those that only impair credibility. 2 JOHN H. WIGMORE, EVIDENCE § 501, at 709 (Chadbourn rev. 1979). Dean Wigmore further argued that it is

better to allow juries to hear everyone's testimony, for whatever that testimony is worth, than to exclude what might be the only witness to an event. *See* 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 501, at 719 (Chadbourn rev. 1978). A majority of states have witness competence statutes patterned after Rule 601. *See* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 601[6], at 601-41 to 601-65 (1992) (listing states having statutes similar to FRE 601). For a discussion of the modern approach to witness competence, see generally Michael D. Ermert, *Mental Disorder in Witnesses: An Overview of Competency and Credibility*, 41 ALA. L. REV. 167 (1989), and Michael Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 CAL. L. REV. 648 (1960).

Elimination of competency requirements does not mean, however, that judges are stripped of power to reject the testimony of witnesses who are so impaired that it would be a waste of the jury's time to listen to them. This power continues to exist under several different rules of evidence. *See, e.g.*, FED. R. EVID. 603 (granting judges the authority to exclude the testimony of witnesses who are incapable of comprehending or taking an oath); FED. R. EVID. 602 (granting judges the authority to exclude the testimony of witnesses who are so out of touch with reality that they cannot satisfy the personal knowledge requirement). This power has also been recognized by some courts. *See, e.g.*, *United States v. Phibbs*, 999 F.2d 1053, 1069 (6th Cir. 1993) (discussing courts' ability to exclude testimony if a witness's behavior indicates a lack of personal knowledge), *cert. denied*, 114 S. Ct. 1071 (1994). Moreover, judges retain the power to exclude the testimony of witnesses who lack what Weinstein and Berger call "minimum credibility," so that no reasonable jurors could believe them. *See* 3 WEINSTEIN & BERGER, *supra*, ¶ 601[01], at 601-9 to 601-11. This power is derived from Rule 401 of the Federal Rules of Evidence, allowing the court the power to reject irrelevant testimony, and Rule 403 of the Federal Rules of Evidence, allowing the court to exclude testimony if the danger of unfair prejudice outweighs the evidence's probative value. *See United States v. Valdez*, 722 F.2d 1196, 1201-03 (5th Cir. 1984) (excluding post-hypnotic identification where hypnotism was "unduly suggestive"); *Ivy v. State*, 522 So. 2d 740, 742 (Miss. 1988) (finding child witness competent under Rule 601, but acknowledging that judge still makes relevancy determination); *State v. Beachum*, 643 P.2d 246, 252 (N.M. Ct. App. 1981) (deciding that post-hypnotic memories are only admissible when hypnotism was properly performed and not suggestive), *cert. quashed by* 644 P.2d 1040 (1982); *State v. Fulton*, 742 P.2d 1208, 1218 (Utah 1987) (stating that Rule 403 may be proper grounds for excluding testimony of child witness), *cert. denied*, 484 U.S. 1044 (1988); WEINSTEIN & BERGER, *supra*, ¶ 601[04]; *see also State v. Tuttle*, 780 P.2d 1203, 1220-21 (Utah 1989) (Durham, J., concurring & dissenting) (stating that admission of post-hypnotic testimony should be determined by balancing probative value and unfair prejudice), *cert. denied*, 494 U.S. 1018 (1990). Despite residual powers, modern courts rarely exclude the testimony of mentally disordered witnesses, even when those witnesses are seriously impaired. *See, e.g., Phibbs*, 999 F.2d at 1068-69 (finding witness suffering from confusion, agitation, paranoia, and hallucinations competent); *Richardson v. State*, 803 S.W.2d 557, 559 (Ark. Ct. App. 1991) (finding witness with IQ between 45-50 competent); *State v. Brown*, 400 N.W.2d 74, 75 (Iowa Ct. App. 1986) (finding witness suffering from Down's Syndrome competent); *State v. Brovold*, 477 N.W.2d 775, 778 (Minn. Ct. App. 1991) (finding three year-old witness competent), *denial of habeas corpus aff'd by*

on this assumption, this Article examines the various ways MPD can impact the performance of a witness.³⁰ This disorder can have a global impact,³¹ impairing the capacity to receive accurate memory impressions,³² to recollect³³ and communicate the impressions to others,³⁴ and to comprehend the obligations of an oath.³⁵ Lawyers and judges will need to understand the limitations of a person with MPD in order

Brovold v. Erickson, 27 F.3d 571 (8th Cir. 1994).

29. See, e.g., Dorsey v. State, 426 S.E.2d 224, 228-29 (Ga. Ct. App. 1992); Thornton v. State, 653 N.E.2d 493, 500-01 (Ind. Ct. App. 1995); State v. Donnelly, 798 P.2d 89, 94-95 (Mont. 1990), *overruled on other grounds by* State v. Imlay, 813 P.2d 979 (Mont. 1991).

30. The phrase "witnesses with MPD" carries the misleading suggestion that all witnesses with this disorder will be alike. Multiples, like witnesses suffering from any other emotional disturbance, will be impaired in varying degrees. They will run the gamut from people who hold down responsible jobs and practice professions to people who are unable to function. See generally Richard P. Kluft, *High-Functioning Multiple Personality Patients: Three Cases*, 174 J. NERVOUS & MENTAL DISEASE 722 (1986) (discussing case histories of two physicians and a research scientist with MPD). Multiple personality disorder is not incompatible with success in life. One-fifth of the patients (20/100) in Dr. Frank Putnam's NIMH study held advanced degrees. See PUTNAM, *supra* note 1, at 101.

The impact of this disorder on the performance of a witness is likely to vary, both with the witness's functional impairment and with the issues involved in the case. MPD will have its greatest impact in trials involving shocking incidents. This is because the underlying event will have been experienced in a dissociative state. See *infra* part II. Dissociation is a major cause of the problems upon which this Article focuses. Similar problems are unlikely to arise at trials involving emotionally neutral experiences. At such trials, the witness's disorder is unlikely to have an appreciable impact either on the accuracy of the witness's recall or on the witness's courtroom demeanor.

31. Despite their serious impairments, multiples will make surprisingly convincing witnesses. They have the uncanny ability to convert people they have just met into their defenders and champions. Their powers of persuasion are evidenced by the fact that 88% of therapists who treat patients with this disorder believe their patients' stories of satanic ritual abuse. See Nancy E. Perry, *Psychotherapists' Experiences of the Effects of Working with Dissociative Disorders Patients* 4 (1992) (unpublished manuscript, on file with Trauma Disorders Institute, Milwaukee, Wisconsin). This is true even when the stories are improbable and go against the findings of law enforcement agencies. See, e.g., Kenneth V. Lanning, *Ritual Abuse: A Law Enforcement View or Perspective*, 15 CHILD ABUSE & NEGLECT 171, 172-73 (1991); Witham, *supra* note 12, at A9; 'Recovered Memory' In Doubt: Study Uncovers No Clear Evidence of Abuse by Cults, S.F. CHRON., Nov. 6, 1994, at C3.

32. See *infra* part V.

33. Particular information may be available only if the witness is in the correct state. This will create the need to call out different identities. See *infra* Part IV. The identity-state dependency of a multiple's recall will place the defense at a disadvantage since the defense is unlikely to know which states exist, much less which ones house the desired memories.

34. See *supra* note 33 and accompanying text.

35. See *infra* part III.

to exercise sound judgment on the many issues that may arise when a multiple takes the witness stand.³⁶

I. FROM TRAUMA, DISSOCIATION, AND SPONTANEOUS SELF-HYPNOTISM TO MULTIPLE PERSONALITY DISORDER

Multiple personality disorder is a "dissociative disorder."³⁷ Dissocia-

36. This Article is concerned with the problems inherent in the testimony of witnesses with this disorder, rather than with the emotional fragility these witnesses may display. The stressful demands of the courtroom and of cross-examination may at times be overwhelming, necessitating protective measures to facilitate testimony. On the constitutionality of using protective measures with adult witnesses, see generally Lisa H. Thielmeyer, *Beyond Maryland v. Craig: Can and Should Adult Rape Victims Be Permitted to Testify by Closed-Circuit Television?*, 67 IND. L.J. 797 (1992). In fixing trial dates, judges should keep in mind that postponing proceedings to allow additional time for treatment may make trials less stressful on everyone.

37. The "dissociative disorders" are a group of five disorders characterized by disturbances of consciousness, perception, identity, or memory. See DSM IV, *supra* note 9, §§ 300.6, 300.12-300.15, at 477-81. These disorders include: (1) multiple personality disorder (characterized by the presence of two or more identities and an inability to recall important personal information too extensive to be explained by ordinary forgetfulness); (2) dissociative amnesia (characterized by loss of memory for important personal information, usually brought on by traumatic stress); (3) dissociative fugue (characterized by the sudden, unexpected travel away from home, loss of memory for important personal information, and confusion about identity); (4) depersonalization disorder (characterized by persistent feelings of being disconnected from mind or body); and (5) dissociative disorders not otherwise specified (characterized by dissociative disturbances of identity or memory not within any of the other four diagnostic categories). For a discussion of the various disorders, see DSM-IV, *supra* note 9, at §§ 300.14 (Dissociative Identity Disorder (formerly MPD)), 300.12 (Dissociative Amnesia), 300.13 (Dissociation Fugue), 300.6 (Depersonalization Disorder), 300.15 (other dissociative disorders). MPD is the most serious of the five dissociative disorders.

In the American Psychiatric Association's latest Diagnostic Manual, DSM-IV, which came out in 1994, MPD was renamed. Its new name is "dissociative identity disorder." See *infra* note 61. The name change was made to emphasize that multiples have only one personality, which is dissociatively fragmented, rather than multiple personalities. See, e.g., Scott, *supra* note 12, at 4A. Although the new name contains a better description of this disorder, this Article will continue using the old one because lawyers are more familiar with it.

There is a vast and growing literature on MPD. For listings, see generally CAROLE GOETTMAN ET AL., MULTIPLE PERSONALITY AND DISSOCIATION, 1791-1990: A COMPLETE BIBLIOGRAPHY (1991) (available through George B. Greaves); MOSHE S. TOREM, MULTIPLE PERSONALITY, DISSOCIATIVE STATES, AND TRAUMATIC STRESS DISORDERS: A BIBLIOGRAPHY FOR ADDITIONAL READING (2d ed. 1990) (available through Akron General Medical Center). For comprehensive clinical treatments, see generally BLISS, *supra*

tion alters the way experiences are represented in awareness and stored in memory.³⁸ An experience has four major components: thoughts, behaviors, emotions, and physical sensations.³⁹ In normal mental functioning, all four components are processed in awareness and stored in memory as a unit. Dissociation involves a break in the normal associative processing of experiential data. During dissociative episodes, components of an experience or the entire experience become separated from the main stream of consciousness and are processed outside awareness.⁴⁰ If parts of an experience are dissociated, the experience will have a distorted or unreal quality; thoughts, feelings, emotions, sensations, or behaviors that normally are present will be missing.⁴¹ If the entire experience is dissociated, it will not be regis-

note 4, at 193-220; BLOCH, *supra* note 22, at 43-81; CLINICAL PERSPECTIVES ON MULTIPLE PERSONALITY DISORDER, *supra* note 27; PUTNAM, *supra* note 1; ROSS, *supra* note 4; Richard P. Kluft, *The Dissociative Disorders*, in TEXTBOOK OF PSYCHIATRY 557, 569-79 (J. A. Talbott et al. eds., 1988); John C. Nemiah, *Dissociative Disorders (Hysterical Neurosis, Dissociative Type)*, in 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 942 (Harold I. Kaplan & Benjamin J. Sadock eds., 4th ed. 1985).

38. For a theoretical treatment of dissociation, see generally SINGER, *supra* note 1, and ERNEST R. HILGARD, *DIVIDED CONSCIOUSNESS: MULTIPLE CONTROLS IN HUMAN THOUGHT AND ACTION* (1977). For an explanation of how dissociation works to defend the psyche against trauma, see BLISS, *supra* note 4, at 164-92; BLOCH, *supra* note 22, at 1-11; PUTNAM, *supra* note 1, at 6-23; Bennett G. Braun, *BASK Model of Dissociation* (pts. 1 & 2), in 1 DISSOCIATION: PROGRESS IN THE DISSOCIATIVE DISORDERS 4 (1988) (Part I), and in 2 DISSOCIATION: PROGRESS IN THE DISSOCIATIVE DISORDERS 16 (1988) (Part II) [hereinafter collectively Braun, *BASK*]; Bennett G. Braun, *Psychotherapy of the Survivor of Incest With A Dissociative Disorder*, 12 PSYCHIATRIC CLINICS OF N. AM. 307, 307-12 (1989) [hereinafter Braun, *Survivor of Incest*]; Frank W. Putnam, Jr., *Dissociation as a Response to Extreme Trauma*, in CHILDHOOD ANTECEDENTS OF MULTIPLE PERSONALITY 66 (Richard P. Kluft ed., 1985) [hereinafter Putnam, *Dissociation*]; David Spiegel, *Dissociation, Double Binds, and Posttraumatic Stress in Multiple Personality Disorder*, in TREATMENT OF MULTIPLE PERSONALITY DISORDER 61 (B. Braun ed., 1986) [hereinafter Spiegel, *Double Binds*].

39. See, e.g., BLOCH, *supra* note 22, at 1-11; Braun, *BASK*, *supra* note 38, at 4-9; Kanovitz, *supra* note 2, at 1205-07.

40. See, e.g., BLOCH, *supra* note 22, at 1-21; HILGARD, *supra* note 38, at 216-24, 242-56; PUTNAM, *supra* note 1, at 12-23; ROSS, *supra* note 4, at 86-90; Braun, *BASK*, *supra* note 38, at 5; Braun, *Survivor of Incest*, *supra* note 38, at 307-12.

41. Dissociation is a common response to trauma. Trauma victims often experience memory blackouts, emotional detachment, lack of responsiveness, time distortions, physical numbness, feelings of estrangement from body, uncertainty whether the experience is real or a dream, and similar alterations of reality while the event is in progress. These alterations are due to dissociation. See, e.g., Catherine Classen et al., *Trauma and Dissociation*, 57 BULL. MENNINGER CLINIC 178 (1993); Kanovitz, *supra* note 2, at 1204-09; David Spiegel, *Hypnosis in the Treatment of Victims of Sexual Abuse*, 12 PSYCHIATRIC CLINICS OF N. AM. 295, 295-99 (1989) [hereinafter Spiegel, *Victims of Sexual Abuse*]; David Spiegel & Etzel Cardena, *Disintegrated Experience: The Dissociative Disorders Revisited*, 100 J. ABNORMAL PSYCHOL. 366, 369-70 (1991). Dissociation disorganizes the experience, causing components to be processed outside

tered in consciousness and amnesia will result.⁴²

Dissociation is a common occurrence in everyday life. It is brought on by intense absorption. Intense absorption can block awareness of thoughts, feelings, sensation, and behaviors one is then experiencing. Driving a car while lost in thought is an example.⁴³ Absorption of the conscious part of the mind in reflection crowds the fact that one is driving out of awareness. The car seems to travel on its own. However, this is not the case. Another part of the mind is attending to this chore. Because driving has been dissociated and carried on outside awareness, memories of the trip are not accessible to normal recall.⁴⁴

Dissociation also has adaptive functions. It can cushion psychological blows by preventing unbearable experiences from being registered in consciousness.⁴⁵ The key to disassociation is one's capacity for intense absorption.⁴⁶ People who have a high capacity for intense absorption can make unbearable experiences "disappear" by concentrating their attention, redirecting it and intensely focusing it on something else, such as a pleasant memory, intriguing fantasy, or even a spot on the wall. For people with this capacity, dissociation takes place like an automatic reflex action. The total absorption of the conscious part of the mind in other matters pushes the experience out of awareness and

awareness. The missing components give the rest of the experience a distorted or unreal quality. Dissociation is also the explanation that accounts for the amnesia that rape victims, soldiers after battle, and other victims of unbearable ordeals sometimes report. See, e.g., Putnam, *Dissociation*, *supra* note 38, at 72-74. For authorities concerning the process where dissociation works to defend the psyche against trauma, see *supra* note 38.

42. See, e.g., David Spiegel, *Hypnosis, Dissociation, and Trauma: Hidden and Overt Observers*, in *REPRESSION AND DISSOCIATION: IMPLICATIONS FOR PERSONALITY THEORY, PSYCHOPATHOLOGY, AND HEALTH* 121 (Jerome L. Singer ed., 1990) [hereinafter Spiegel, *Hypnosis, Dissociation, and Trauma*].

43. See, e.g., PUTNAM, *supra* note 1, at 9-10.

44. See, e.g., Spiegel, *Hypnosis, Dissociation, and Trauma*, *supra* note 42, at 123-37 (using computer analogy to explain why information absorbed without conscious registration is inaccessible to normal recall).

45. See *supra* notes 38, 41 and accompanying text.

46. See, e.g., Spiegel, *Hypnosis, Dissociation, and Trauma*, *supra* note 42, at 121, 124; Spiegel, *Victims of Sexual Abuse*, *supra* note 41, at 295-99. For a theoretical discussion of how dissociation divides consciousness, see generally HILGARD, *supra* note 38.

forces another part of the mind to take over.⁴⁷ When an experience is dissociated and carried on outside awareness, amnesia results.

Traumatized children with a capacity for intense absorption learn that they can make traumatic experiences "disappear." This discovery starts them on the road to MPD.⁴⁸ Most people, lost in thought, can make everyday objects, such as highways and mailboxes, seem to vanish. Special cognitive traits are required, however, to make horrors like incest vanish. The traits necessary to accomplish this feat are usually found only in people who are highly hypnotizable.⁴⁹ Dissociative capac-

47. See Spiegel, *Hypnosis, Dissociation, and Trauma*, *supra* note 42, at 121; *supra* note 46 and accompanying text.

48. For the factors hypothesized as responsible for development of MPD, see *supra* notes 45-47 and *infra* notes 49-62 and accompanying text.

49. Richard J. Lowenstein, *Posttraumatic and Dissociative Aspects of Transference and Countertransference in the Treatment of Multiple Personality Disorder*, in CLINICAL PERSPECTIVES ON MULTIPLE PERSONALITY DISORDER 51, 61 (Richard P. Kluft & Catherine G. Fine, eds., 1993). The link between hypnotic capacity and MPD was discovered in the 19th century. Dr. Richard J. Lowenstein has observed that:

MPD patients . . . naturalistically display phenomena homologous to that seen in highly hypnotizable subjects without MPD studied in research paradigms. These include intense absorption experiences, spontaneous trances, complex amnesias, hyperamnesia, anesthetics, spontaneous negative hallucinations and age-regressions, dissociated motor actions, complex multimodal hallucinations and imagery, out-of-body experiences, hidden observer-like phenomena, and trance logic. A Spiegel eye-roll frequently accompanies switches in MPD patients, although this may be difficult to observe because of eyelid closure. Further, MPD patients usually manifest high scores on standard scales of hypnotizability.

Id. (citations omitted).

Hypnotic capacity plays a central role in most contemporary theories explaining the development of MPD. PUTNAM, *supra* note 1, at 9-10; see Bennett G. Braun, *Issues in the Psychotherapy of Multiple Personality Disorder*, in TREATMENT OF MULTIPLE PERSONALITY DISORDER 1, 4-5 (Bennett G. Braun ed., 1986) (citing the use of hypnotic suggestion); Edward J. Frischholz, *The Relationship Among Dissociation, Hypnosis, and Child Abuse in the Development of Multiple Personality Disorder*, in CHILDHOOD ANTECEDENTS OF MULTIPLE PERSONALITY DISORDER 99 (Richard R. Kluft ed., 1985); Doris Gruenewald, *On the Nature of Multiple Personality: Comparison with Hypnosis*, 32 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 170, 171-73 (1984); Frank W. Putnam, *Recent Research On Multiple Personality Disorder*, 14 PSYCHIATRIC CLINICS OF N. AM. 489, 498-99 (1991) [hereinafter Putnam, *Recent Research*]; Spiegel, *Victims of Sexual Abuse*, *supra* note 41, at 298-99. Dr. Eugene Bliss states that:

The crux of the syndrome of multiple personality seems to be the patient's unrecognized abuse of self-hypnosis. This unintentional misuse seems to be the primary mechanism of the disorder. The process begins very early in childhood, and thereafter self-hypnosis becomes the dominant mode of coping with stress. Unpleasant experiences are henceforth forgotten and delegated to a personality by the switch into a hypnotic state.

BLISS, *supra* note 4, at 125-26.

ity and hypnotizability are measurable traits⁵⁰ that usually go hand-in-hand.⁵¹ The most widely accepted theory about the origin of MPD postulates that it develops out of a highly hypnotizable child's recurring need for psychological flight from trauma.⁵² Fear causes the child to

Dr. Bliss regards high hypnotic capacity as sufficient by itself to explain the development of MPD. *Id.* Most theorists, however, regard childhood trauma to be a necessary co-ingredient. *See infra* note 52. Elevated hypnotic capacity and childhood trauma may themselves be linked. Dr. Josephine Hilgard discovered this relationship while investigating the childhood backgrounds and personality characteristics of people who are highly hypnotizable. Childhood trauma turned out to be one of the two strongest predictors of high hypnotic capacity. *See* JOSEPHINE R. HILGARD, *PERSONALITY & HYPNOSIS: A STUDY IN IMAGINATIVE INVOLVEMENT* 207-24, 242-47, 270-87 (2d ed. 1979). Dr. Hilgard speculates that high hypnotic capacity may develop from an abused child's need to escape from a harsh reality. *Id.* at 283-85. Other researchers have replicated Hilgard's findings suggesting that elevated hypnotic capacity may, for some, represent a traumatically-induced trait. *See, e.g.,* Kanovitz, *supra* note 2, at 1208 n.90, 1240. These findings indirectly validate theories postulating the traumatic origins of MPD. *See* Spiegel, *Double Binds*, *supra* note 38, at 65; David Spiegel, *Multiple Posttraumatic Personality Disorder*, in *CLINICAL PERSPECTIVES ON MULTIPLE PERSONALITY DISORDER* 87, 90-91 (Richard P. Kluft & Catherine G. Fine eds., 1993).

50. *See, e.g.,* Eve M. Bernstein & Frank W. Putnam, *Development, Reliability, and Validity of a Dissociation Scale*, 174 J. NERVOUS & MENTAL DISEASE 727, 732 (1986); Carlo Piccione et al., *On the Degree of Stability of Measured Hypnotizability over a Twenty-Five Year Period*, 56 J. PERSONALITY & SOCIAL PSYCHOL. 289 (1989).

51. *See, e.g.,* PUTNAM, *supra* note 1, at 53; Spiegel, *Hypnosis*, in *TEXTBOOK OF PSYCHIATRY* 907, 910 (John A. Talbott et al. eds., 1988) [hereinafter Spiegel, *Hypnosis*]; Moshe S. Torem et al., *Post-Traumatic Stress Disorder, Dissociation, and Hypnotizability* (1992) (unpublished manuscript, on file with Akron General Medical Center). Multiples outscore other patient populations on tests measuring both traits. *See, e.g.,* BLISS, *supra* note 4, at 123-26; Torem et al., *supra*.

52. Most experts today believe that the development of MPD requires an interplay between constitutional and environmental factors. The constitutional factors include high hypnotic capacity and an easy ability to dissociate. *See supra* notes 49-51 and accompanying text. The most widely accepted theory postulates that when a child with these biological endowments is repeatedly traumatized, she begins using these endowments to block the trauma from awareness. Multiple personality disorder develops from this use. *See, e.g.,* BLOCH, *supra* note 22, at 12-13; PUTNAM, *supra* note 1, at 45-54; Braun, *supra* note 49, at 3-8; Bennett G. Braun & Roberta G. Sachs, *The Development of Multiple Personality Disorder: Predisposing, Precipitation, and Perpetuating Factors* in *CHILDHOOD ANTECEDENTS OF MULTIPLE PERSONALITY DISORDER* 38, 42-52 (Richard P. Kluft ed., 1986); Richard P. Kluft, *Clinical Presentations of Multiple Personality Disorder*, 14 *PSYCHIATRIC CLINICS OF N. AM.* 605, 610 (1991) [hereinafter Kluft, *Clinical Presentations*]; Richard P. Kluft, *Treating Children Who Have Multiple Personality Disorder*, in *TREATMENT OF MULTIPLE PERSONALITY DISORDER* 81, 86-89 (Bennett G. Braun ed., 1986) [hereinafter Kluft, *Treating Children*]; Spiegel, *Double Binds*, *supra* note 38, at 64-66.

undergo a rapid narrowing of attention, precipitating entry into a spontaneous, self-hypnotic trance.⁵³ The child dissociates and experiences the trauma inside the trance.⁵⁴ Dissociation offers an efficient solution for an abused child.⁵⁵ The child is able to block the experience from awareness, isolate the memory, and suppress trauma-reactive rage so that she can continue living with abusive caretakers she is powerless to

Some theorists append a factor or two of their own to the theory of the traumatic origins of MPD. Dr. Richard P. Kluft, for example, believes that traumatized children with these endowments will develop MPD only if they do not receive adequate comforting and soothing to restore normal childhood development. Kluft, *Treating Children*, *supra*, at 87-89. Drs. Braun and Sachs, on the other hand, claim that the development of MPD requires an inconsistently stressful environment, making it necessary for the child to fragment in order to keep memories of loving and abusive interactions separate. Braun & Sachs, *supra*, at 42-52.

Different hypotheses are also used to explain how highly hypnotizable children create alter identities. Drs. Braun and Sachs believe that identities develop because the alter-state memories of abuses become chained together and elaborated upon. *Id.* at 49. Dr. Putnam conjectures that traumatized children fantasize imaginary companions, endow their companions with physical and psychological characteristics, and then later internalize them. PUTNAM, *supra* note 1, at 53-54; Frank W. Putnam, *Dissociative Disorders in Children and Adolescents: A Developmental Perspective*, 14 PSYCHIATRIC CLINICS OF N. AM. 519, 523-24 (1991). These explanations are not necessarily inconsistent. Highly hypnotizable children may use several recipes for alter creation. See *infra* notes 58-62 and accompanying text.

53. See, e.g., BLISS, *supra* note 4, at 123-26. Hypnosis involves a state of altered concentration. During hypnosis, the subject's attention becomes intensely concentrated and focused, causing a decrease in peripheral awareness. See, e.g., Spiegel, *Hypnosis*, *supra* note 51, at 908. Highly hypnotizable subjects are able to lose themselves when they undergo hypnosis. The physical world vanishes and the mental world is all that exists. See, e.g., BLISS, *supra* note 4, at 66-67; HILGARD, *supra* note 38, at 160.

Hypnosis is not a spell cast on the subject by the hypnotist; it is an innate capacity. The hypnotist merely acts as a facilitator, aiding the subject to relax, concentrate, and focus attention. Once this happens, the subject's natural capacities take over. See, e.g., BLISS, *supra* note 4, at 70. People vary in the degree to which they are capable of sustaining hypnosis. See, e.g., HILGARD, *supra* note 38, at 155-62. Subjects who are highly hypnotizable do not need the help of a hypnotist to undergo trance. They can spontaneously self-hypnotize by gazing at a spot on the wall, staring at a light, or looking too long in a pond; anything that causes their attention to become overly concentrated and focused can bring on hypnosis. See, e.g., BLISS, *supra* note 4, at 69-78.

54. Dr. David Spiegel conceptualizes the process as being in the nature of a chain reaction: trauma causes a rapid narrowing of focus, the narrowing of focus triggers a spontaneous self-hypnotic trance, and this, in turn, leads to dissociation. See, e.g., Spiegel, *Victims of Sexual Abuse*, *supra* note 41, at 296-97.

55. See, e.g., BLOCH, *supra* note 22, at 13; ELIANA GIL, TREATMENT OF ADULT SURVIVORS OF CHILDHOOD ABUSE 149 (2d ed. 1990); PUTNAM, *supra* note 1, at 53 (noting the use of dissociation as an escape). The gains, however, are purely over the short term and are received at the expense of chronic memory disturbance and the loss of a cohesive sense of self. Kluft, *supra* note 22, at 168.

leave.⁵⁶ The experience is represented in consciousness as, at most, a puzzling sense of time-loss.⁵⁷

Multiple personality develops in early childhood, a time of intense imagination when youngsters fantasize about imaginary companions, guardian angels, and fairies. Rich imaginations allow children to maintain elaborate relationships with inanimate objects, such as dolls and toys.⁵⁸ Once a dissociatively-gifted child realizes that she can make a terrifying experience vanish, she begins experimenting with her magic, using it for other purposes.⁵⁹ She discovers that she can conjure playmates and go anywhere or be anyone she wants by withdrawing into her mind. Each time the child dissociates into an altered state, additional memories are added and become state-dependently bound to this particular state.⁶⁰ These memories gradually accumulate and may eventually shape the altered state into a discrete and discriminate identity,⁶¹ with its own personality characteristics, life history, and state-dependent memories.⁶² Multiple personality disorder has now begun.

56. See, e.g., BLOCH, *supra* note 22, at 13.

57. See, e.g., PUTNAM, *supra* note 1, at 74-77. The following question asked on diagnostic interviews may help the reader understand time-loss: Have you ever experienced "looking at a clock and seeing that it was, say, 9:00 in the morning, and the next thing you are aware of is that it is, say, 3:00 in the afternoon and you have absolutely no recollection of what has happened between 9:00 a.m. and 3:00 p.m.?" *Id.* at 74.

58. See, e.g., BLISS, *supra* note 4, at 73-78.

59. See, e.g., *id.* at 70-78; PUTNAM, *supra* note 1, at 54 (noting the creation of imaginary companions).

60. The child's memories are alter-state-dependent in the sense that the child is usually able to remember events that took place in an altered state only when the child is again in that state. The memories are not otherwise accessible to conscious recall. For a discussion of how memory compartmentalization will affect performance as a witness, see *infra* part IV.

61. A multiple's self-parts have traditionally been called personalities. This designation was misleading because it suggested a degree of psychological separateness greater than that which existed. To clear up this confusion, the American Psychiatric Association recently renamed the disorder "dissociative identity state" and eliminated use of term personality in reference to a multiple's self-states. They are now called "identities" or "personality states." See DSM-IV, *supra* note 9, at 484; *supra* note 37.

Multiple personality systems have a "host" state and one or more alternate identities. The host is the state that is in control most of the time or, in other words, the multiple's "normal" identity. See, e.g., PUTNAM, *supra* note 1, at 107. The host state is not necessarily constant over a lifetime. During different periods, different parts of a multiple's personality can be dominant and, thus, serve as the host. See, e.g., Braun, *supra* note 49, at xiii (defining "host").

62. See, e.g., BLOCH, *supra* note 22, at 27-28; *supra* note 52 and accompanying

II. HOW MULTIPLE PERSONALITY SYSTEMS FUNCTION

After the initial split, the child finds identity creation easy, and new identities are added whenever the child encounters stresses beyond the ability to cope.⁶³ Each alternate identity-state (alter)⁶⁴ is assigned a fixed set of psychological, physiological, or maintenance tasks to perform.⁶⁵ The alters created and the tasks they are assigned are unique to each personality system. The formation depends on the environmental stresses and psychological conflicts in the child's life when the system is configured.⁶⁶ An incestuously abused child might find it necessary to

text. The following description from Drs. Bennett Braun and Roberta Sachs may help conceptualize how identity states are formed and how they function:

The formation of an alternate personality occurs when a series of fragmented but defensively related [dissociative] episodes, linked by a common affective state, take on an identity of their own. This usually happens when the series of episodes are conceptually related to a particular type of event. At this point, an analogy between computers and multiple personality disorder becomes useful. It is almost as if two memory systems are created. Memory System "A" contains information that forms the identity of the "host" personality. Memory System "B," which is split off from Memory System "A" contains information which system A was unwilling or unable to integrate. This information can be centered around a common theme, such as anger toward authority (parental) figures, developmentally conflicted drives, or opposing emotions. The structurally organizing theme of these previously fragmented [dissociative] episodes now gives the new entity an identity and purpose. In the case of anger toward authority figures, this new personality may pop up whenever the host personality feels he or she is pushed around by someone who is perceived as having some control over his or her life

Braun & Sachs, *supra* note 52, at 49.

63. See, e.g., BLOCH, *supra* note 22, at 27-28; Cornelia B. Wilbur, *The Effect of Child Abuse on the Psyche*, in CHILDHOOD ANTECEDENTS OF MULTIPLE PERSONALITY DISORDER 21, 27-31 (Richard P. Kluff ed., 1985).

64. "Alter" stands both for alternate identity and altered state of consciousness. When the multiple enters an altered state of consciousness, she experiences herself as being a different person—hence, the term alternate identity. This belief, however, is a delusion. A multiple's self-states do not possess the richly textured complexity and the full range of emotions of a whole person because they are not whole persons. See, e.g., BLISS, *supra* note 4, at 132-33. They are dissociated parts of a multiple's fragmented personality. See *supra* notes 27, 37, 61 and accompanying text; *infra* note 75 and accompanying text.

65. See, e.g., BLISS, *supra* note 4, at 129-32; BLOCH, *supra* note 22, at 27-32; PUTNAM, *supra* note 1, at 103-04, 106-17 (explaining specialized functions of each alter); Wilbur, *supra* note 63, at 27-31.

66. Although each personality system is unique, certain identities are more common than others. Most personality systems include a host that acts as the system's ambassador to the Newtonian world, child alters that usually have as their primary function holding memories of childhood traumas, persecutor states that recreate childhood abuses by tormenting the host, and protector states that seek to prevent harms, both from within and without. See, e.g., BLOCH, *supra* note 22, at 29-30; PUTNAM, *su-*

create a half a dozen or more identities to cope with the psychological effects of incest. One identity might be needed to house the terrifying memories, another to protect bodily integrity, a third to discharge rage, a fourth to contain sexual urges, a fifth to inflict self-punishment, a sixth to be anesthetic to pain, and so forth.

The host identity is the multiple's normal state and is usually emotionally fragile.⁶⁷ The other states, that is, alternate identities, function to keep stressful thoughts, memories, emotions, and behaviors out of the host's awareness.⁶⁸ An identity switch usually means that the host has experienced an emotion such as fear, anger, loneliness, or sexuality, which is too stressful for the host to endure.⁶⁹ When the host feels overwhelmed, the state developed to cope with stresses of this type will automatically "come out" and take control.⁷⁰ If anger has been delegated as an emotion too anxiety-provoking for the host to bear and the host encounters an anger-provoking situation, a switch will take place, the host will disappear, and the identity in charge of expressing anger will become dominant. This state will discharge the system's anger

pra note 1, at 106-14 (reviewing specific types of alter personalities).

67. The host state is "normal" both in the sense of being in control most of the time and in its function of adapting to the external world. The host is unlikely to play a starring role at trials involving complaints of abuse because, during times of stress, the host takes refuge inside. The states that take over for the host will be the ones, though not necessarily the only ones, that will be aware of what happened. See *infra* notes 71, 77, 98-108 and accompanying text. If the host is also aware, its knowledge is most likely to come from memories that have been recovered and reintegrated into consciousness through psychotherapy, rather than derived from original awareness. For methods used to restore dissociated memories, see *infra* parts VI, VII.

68. See, e.g., Wilbur, *supra* note 63, at 27-31. Dr. Wilbur discussed a patient who in her normal state of consciousness had never experienced an angry thought. *Id.* at 27. Nevertheless, the patient was a very angry person. *Id.* Her anger had been delegated to an alternate identity so that it could be expressed outside awareness. *Id.*

69. See, e.g., BLISS, *supra* note 4, at 132.

70. The transition from one identity to another, called "switching," involves dissociation. For the observable physical manifestations accompanying a switch, see *infra* notes 117-19 and accompanying text. Untreated multiples usually have very little control over this process. See, e.g., PUTNAM, *supra* note 1, at 117. A switch automatically takes place when a multiple encounters a problem that has been delegated to an alternate identity for management. *Id.* Idiosyncratic environmental cues, intrapsychic conflicts, and psychosocial pressures can all act as triggers. See, e.g., BLISS, *supra* note 4, at 132; Kluft, *supra* note 7, at 573. Stress, however, is the most common cause of switching. Untreated multiples have difficulty undergoing stress without dissociating. For a discussion of how this problem will complicate cross-examination, see *infra* notes 116-20 and accompanying text.

outside the host's awareness, sparing the host from being in touch with this intolerably stressful emotion.⁷¹

Alter identities are not separate psychological persons. They are dissociated self-states that take over when it is necessary for the multiple to execute emotions, thoughts, and behaviors that the multiple is incapable of executing in a normal consciousness state. The multiple's self-states work together to accomplish all the psychological, physiological, and maintenance tasks of integrated personalities.⁷² Consequently, multiples are more like, than unlike, other humans.⁷³ Yet, they differ in one

71. When a switch occurs, the host will cease being conscious of the body's behaviors until it comes out again. PUTNAM, *supra* note 1 at 72-76. Upon "awakening," it will experience the intervening period as time-loss. For a description of the sensation of time-loss, see *supra* note 57. If the period is extensive, however, the host may not even have this level of awareness. Lost time may be covered up by confabulating pseudomemories which provide a false sensation of psychological continuity. PUTNAM, *supra* note 1, at 73; see also *infra* notes 136-38 and accompanying text.

For the arriving alter, the situation is similar to being beamed onto the earth from an alien planet. The newcomer is usually unaware of what was going on prior to its arrival. Nonetheless, it quickly orients itself and starts interacting with the environment. Transitions are usually sufficiently subtle to go unrecognized by untrained observers.

72. The fact that identity-states manage to come out and take control at the appropriate times indicates that multiples have a central mechanism that monitors the environment and decides which part of the personality needs to be dominant. See HILGARD, *supra* note 38, at 185-256. This awareness provides further evidence that identity states are parts of a single personality rather than separate people.

73. Courts have had difficulty applying the M'Naghten insanity test to multiples. See, e.g., *State v. Wheaton*, 850 P.2d 507, 512 (Wash. 1993) (conceding insufficient understanding of MPD to formulate a rule on how to apply the M'Naghten test). The difficulty stems from uncertainty over which state—the perpetrating identity or the host—must fail to appreciate the criminality of the conduct for a multiple to be considered insane. For a discussion of various approaches now in use, see Saks, *supra* note 26, at 383, 385-86 (arguing that multiples should not be held criminally accountable for acts performed in altered states because the perpetrating alter and host are, in a philosophical sense different people). Since the perpetrating identity usually appreciates the criminality of the conduct, while the host state, being oblivious to what the body is doing, does not, determining where the focus should be placed in evaluating a multiple's criminal responsibility becomes critical. A majority of courts place the focus on the perpetrating identity's mental state. The multiple is deemed to be legally sane if the state in control at the time of the act appreciates the criminality of the conduct. For courts adopting this position, see *Kirkland v. State*, 304 S.E.2d 561, 564 (Ga. Ct. App. 1983); *State v. Rodrigues*, 679 P.2d 615, 618 (Haw.), *appeal dismissed, and cert. denied*, 469 U.S. 1078 (1984); *Commonwealth v. Roman*, 606 N.E.2d 1333, 1336 (Mass. 1993); *State v. Grimsley*, 444 N.E.2d 1071, 1075-76 (Ohio Ct. App. 1982).

Professor Elyn Saks advocates the opposite view. See Saks, *supra* note 26, at 426-27. She contends that the host personality and the perpetrator are, in a philosophical sense, different people and, consequently, that the host should not be sent to prison for "some else's" crimes. *Id.* She would find multiples insane as a

important respect; they have dissociatively disowned aspects of their own personality. Personality fragmentation results in reduced control over behavior.⁷⁴ A fragmented psyche does not have all of its resources at its disposal. Dissociative memory barriers wall off traits of character and learning from prior experience which, in integrated personalities, are available to counterbalance, offset, and inhibit impulsive feelings and behaviors. As a result, multiples tend to express their feelings in pure, unmodulated form.

III. HOW DELUSIONS OF SEPARATENESS CAN DISTORT UNDERSTANDING OF AN OATH

Dr. Frank Putnam describes an identity as a "highly discrete state of consciousness organized around a prevailing affect, sense of self (including body image), with a limited repertoire of behaviors and a set of

matter of law for the crimes of alters. *Id.* at 452-56. See *United States v. Denny-Shaffer*, 2 F.3d 999, 1012-15 (10th Cir. 1993) (adopting Professor Saks' view); see also Mark E. Hindley, Note, *United States v. Denny-Shaffer and Multiple Personality Disorder: "Who Stole the Cookie from the Cookie Jar?"*, 1994 UTAH L. REV. 961, 964 (1994) (urging Utah courts to follow the position of Professor Saks and *Denny-Shaffer*).

The majority position and Professor Saks's position make the same mistake. Both assume that only part of the multiple's mind should be considered in evaluating criminal responsibility; they disagree on which part. Depending on the part considered, the resulting treatment is either too lenient or too harsh.

Dr. Eugene Bliss has observed that when an alter assumes control of the body, the multiple's actions are, during that period, "partially or completely divorced from judgment, moral mandates, and other factors in memory that ordinarily would function. A small segment of the mind at these times is directing behavior, while the rest of the mind is dormant." BLISS, *supra* note 4, at 148. Since multiples do not have complete access to their moral faculties and judgment when they perform acts in an altered state, evaluating their criminal responsibility without considering their limitations is potentially unfair. The majority position should, for this reason, be rejected. However, rejection of the majority position does not lead to the opposite conclusion, that multiples should bear no responsibility for acts performed in an altered state, as Professor Saks contends. See Saks, *supra* note 26, at 452-56.

Evaluations of criminal responsibility should be based on the multiple's entire personality. Juries should be given broad latitude to consider such factors as the degree to which other states were aware of the crime, whether the acts were alien to the multiple's normal character, and any other factors bearing on moral responsibility. Multiples should be held accountable for their actions unless their actions are so out of character and their awareness and control so slight that attributing them to the multiple seems arbitrary.

74. See, e.g., BLOCH, *supra* note 22, at 8-9; Wilbur, *supra* note 63, at 27-31.

state-dependent memories.”⁷⁵ This definition coincides with objective reality. It does not, however, coincide with an identity’s self-representation. Identities experience themselves as authentic, real people.⁷⁶ They may or may not be aware that other identities exist,⁷⁷ but when they are aware, they experience the “others” as separate from self, as people who are distinctly “not me.”⁷⁸ Delusions of separateness permit unacceptable thoughts, feelings, emotions, and behaviors to be attributed to someone else and thus disowned.⁷⁹

The belief that “she” and “I” are different people is often accompanied by the perspective that “I am not responsible for *her* behavior.”⁸⁰ This perspective can inhibit a multiple’s understanding of an oath. A

75. PUTNAM, *supra* note 1, at 103. Dr. Colin Ross describes identity-states as “dissociative packets of behavior” embodying “highly stylized enactments of inner conflicts, drives, memories, and feelings.” See ROSS, *supra* note 4, at 109; see also *supra* notes 27, 64 and *infra* notes 90-93 and accompanying text.

76. See, e.g., BLOCH, *supra* note 22, at 9, 27; Gruenewald, *supra* note 49, at 170-71.

77. See, e.g., BLOCH, *supra* note 22, at 8; PUTNAM, *supra* note 1, at 107; Kluft, *Clinical Presentations*, *supra* note 52, at 611-16. The average personality system has approximately thirteen identities. See, e.g., PUTNAM, *supra* note 1, at 39. Broad variations exist in interpersonality awareness. Some states are aware of no states but themselves, while others know a great deal more about what is going on in other parts of the system. *Id.* at 114-15. In the NIMH study, 85% of the patients had at least one state that claimed complete knowledge of the names and life histories of all the others. *Id.* Multiples have intricate inner worlds in which their identities are experienced at maintaining complex and elaborate relationships with one another. Their inner worlds can become so intricate that experts recommend using maps, charts, and diagrams to keep this information straight. *Id.* at 210-11.

78. See, e.g., BLOCH, *supra* note 22, at 9; ROSS, *supra* note 4, at 126. The perspective that “she” and “I” are different people is often apparent in the way multiples talk. Many multiples are unable to tell a story in the first person singular if several states participated. Their accounts are punctuated with references to what “he,” “she,” and “they” were doing, thinking, or saying while “I” was doing this. See, e.g., PUTNAM, *supra* note 1, at 84. Shifting self-references may be confusing for jurors. Yet, this problem is not nearly as serious as the possible impact delusions of separateness can have on a multiple’s ability to understand and obey an oath.

79. Delusions of separateness can be so complete that identities sometimes try to murder their internal enemies, unaware of the personal consequences. Suicides for multiples often represent unsuccessful internal homicides. See, e.g., PUTNAM, *supra* note 1, at 287.

80. See, e.g., PUTNAM, *supra* note 1, at 215; see ROSS, *supra* note 4, at 125-30 (identifying cognitive errors). In the following passage, Dr. Frank Putnam warns that some alters will even deny being in therapy:

“Don’t give me any of that therapy bullshit! She’s the patient, not me. I just bring her here,” one alter told me. Some patients will have alters who steadfastly maintain that they are not in treatment. They will claim that they do not have any problems and that it is the other personalities (particularly the host) who are in need of treatment.

PUTNAM, *supra* note 1, at 215.

normal witness would feel she had observed her oath in answering "no" to whether she had performed an act she knew her neighbor had performed, and would sense no duty to volunteer information about matters she was not asked. Nor would such a witness regard it her duty to correct another witness's testimony, even though she knew the other had lied. Multiples are at risk of adopting this attitude toward their own testimony.

To test this theory, the authors posed the following hypothetical to two individuals suffering from MPD.⁸¹ Suppose that Identity B invited someone to the apartment, became frightened and disappeared, leaving the host behind. The host, finding a stranger in her apartment, assumed the worst and filed criminal charges of attempted rape.⁸² If Identity A knew that Identity B had invited the accused to the apartment, would Identity A have an obligation to disclose this information to the defense if asked whether *she* had invited the accused? One multiple responded "yes," while the other answered "no." When the multiple answering "no" was asked whether it would be fair to send an innocent person to prison, she protested, contending that the defendant was not innocent. The host had experienced the defendant's behavior as an assault. Since identity B's invitation did not justify the defendant's assault on the host, there was no reason for identity A to mention this matter in her testimony.

This inquiry, while limited, suggests that some multiples may feel no greater responsibility for their body's testimony when alternate personalities are in control than they would for a total stranger's testimony. Moreover, they may not be able to appreciate that they are committing perjury when they withhold known information unless the question is posed to the "right" identity and is phrased in exactly the "right" way.⁸³

Management of this problem will require meticulous explanation of the duties of a witness.⁸⁴ The judge should hold a meeting in chambers

81. Telephone interview with Ms. X, a patient diagnosed with MPD (May 3, 1993).

82. This situation is not far-fetched. See *infra* notes 133-35 and accompanying text.

83. Defense attorneys need to keep delusions of separateness in mind when asking important questions. Critical questions should be asked in several different ways:

"Ms. A, did you invite the accused to your apartment?"

"No."

"Ms. A, to the best of your knowledge, did any other identity invite the accused?"

"No."

"Ms. A, do you know of any identities who might have additional information about this matter?"

84. Some multiples are so invested in delusions of separateness that they may be

before the start of the testimony to explain the standards by which the court will evaluate the witness's compliance with the oath. At this meeting, the judge should make it clear that the legal system does not share the witness's perspective that identities are people and that the legal system recognizes only one witness.⁸⁵ As such, all identities will be held accountable for the witness's testimony. Regardless of how questions are phrased or which personality state is in control, the witness will violate the oath if she withholds relevant information then available to her conscious recall.⁸⁶

To give this message maximum impact, the judge should use a procedure known as "talking through."⁸⁷ This procedure is used when therapists want to address the entire personality system.⁸⁸ The judge should begin by saying something like: "I want all personality states to give me their full and undivided attention. I expect all states to listen very carefully to everything I am going to say." The judge should then carefully explain the obligations of an oath, making sure that the witness understands that no matter how questions are phrased or which state is out,

unable to grasp the notion that their whole personality is a party to the proceedings. Those who cannot accept this notion should be disqualified from testifying. Elimination of testimonial competency requirements has not destroyed the need for capacity to understand and obey an oath. See *supra* note 28. The judge should not rely on his lay intuition to determine whether the witness is capable of understanding an oath. The court should obtain a psychological evaluation to determine whether the witness understands that her entire personality system is involved in the proceedings and is willing to disclose all information available to her conscious recall. This evaluation will also help the judge prepare for other problems that may lurk ahead.

85. The current practice is to administer the oath anew each time the witness switches identities. See Fields, *supra* note 25, at 272 n.78; Castaneda, *supra* note 16, at 3A. Some judges even conduct separate competency evaluations. See, e.g., Dorsey v. State, 426 S.E.2d 224, 229 n.1 (Ga. Ct. App. 1993); see also Fields, *supra* note 25, at 273 n.80, 288 (arguing that each state that testifies must meet criteria for testimonial competence). Judges rarely explain why they think these extraordinary precautions are necessary. Making sure that the state testifying is aware of the oath and feels bound by it is legitimate. See *supra* note 71. The judge's purpose can equally be served, however, by reminding each state of the prior oath and asking that state whether it remains committed. The second approach is superior to the first because it reinforces the message that the legal system recognizes only one witness.

86. What a multiple is capable of remembering will depend on which state is executive. See *supra* notes 60, 67, 71 and accompanying text; *infra* notes 98-105 and accompanying text. This will make the determination of whether perjury has been committed difficult. Criminal responsibility for perjury should not attach unless the information is available to the witness's conscious recall.

87. PUTNAM, *supra* note 1, at 197-98, 226-27.

88. We do not guarantee that this procedure will be 100% effective. Yet, there are no known procedures with any better chance of disseminating information across personality state lines. The judge may want to investigate the extent to which this procedure has been successful by asking all states who are listening to identify themselves by name.

the answer must be true, to the best of the witness's knowledge, for all parts of the witness's personality system. The judge should further explain that all states are required to listen to the body's testimony and spontaneously correct any false or mistaken information they hear. Upon returning to the courtroom, the judge should administer the oath as follows:

I want all states to give me their full and undivided attention. In a minute I am going to ask ____ (the host) to take this oath:

"I swear for myself and all my states that all testimony given during these proceedings will be truthful and that all states will listen and correct any inaccurate or incomplete testimony they hear."

Are there any states that are unwilling to be bound by this oath? If so, I want you to speak now. Do I hear any objections?⁸⁹

The witness has now taken an oath for all of her states. This is the first step in the oath-procedure. The judge, nevertheless, will need to reinforce the oath each time the witness switches identities. The reason is that the emerging state may be unaware of events before it assumed executive control. There are two ways to reinforce the oath: administer the oath anew or remind the witness that she is under oath and ask whether she remains committed. Administering the oath anew treats each state as a separate person. This contradicts the judge's earlier message that the legal system recognizes only one witness who is responsible for everything the person knows. Consequently, reminding the witness of her prior oath and asking her to reaffirm it is the proper approach.

Trial demeanor raises similar considerations. Trial participants should not pretend that the witness has become a different person when a new state takes over.⁹⁰ Cautions against validating a multiple's delusions of

89. What should the judge do if an identity steps forward in response to the question of whether there are any identities who are unwilling to be bound by the host's oath? The judge should treat the refusal as grounds for disqualification unless the dissenter is willing to take an oath on its own. There is no room in our legal system for witnesses who believe that only a fraction of their personality is involved in a legal proceeding. *See supra* notes 28, 83, 84.

90. PUTNAM, *supra* note 1, at 93, 103, 163; Philip M. Coons, *The Differential Diagnosis of Multiple Personality Disorder*, 7 *PSYCHIATRIC CLINICS OF N. AM.* 51, 53 (1984); *see supra* notes 27, 61, 64, 75. Any lingering confusion over whether identities are separate, psychologically whole people is likely to disappear rapidly once DSM-IV's new terminology takes hold. Under DSM-IV, a multiple's self-parts are no longer called "personalities." They are called "identities" or "personality states." *See supra* notes 37, 61.

separateness are now appearing in clinical literature.⁹¹ Dr. Frank Putnam warns:

It is important to state from the outset that whatever an alter personality is, it is *not* a separate person. It is a serious therapeutic error to relate to alter personalities as if they were separate people. Although many alters will emphatically insist that they are separate people, the therapist must not buy into this delusion of separateness. The therapist can empathize with each alter's feelings of separation and each alter's unique perceptions of experiences and events. But the global message from the therapist should always be that *all* of the alters constitute a whole person.⁹²

Dr. Putnam's warning should be used as a guide for courtroom demeanor.⁹³ How does the warning not to validate delusions of separateness translate into standards of behavior?

Multiples should always be called by their "correct" name, which is the name of their present state.⁹⁴ If the witness is in the state she calls "Jane," she must be addressed as "Jane." Calling her by any other name will only confuse and anger her. Nonetheless, Jane can be addressed in two different ways. Compare the attitudes reflected in each of the following exchanges:

1. "Jane, 'Ann' testified yesterday that"

91. PUTNAM, *supra* note 1, at 103; ROSS, *supra* note 4, at 109. See also Seymour L. Halleck, *Dissociative Phenomena and the Question of Responsibility*, 38 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 298, 306-09 (1990) (arguing that holding multiples accountable for their behavior will enhance goals of treatment).

92. PUTNAM, *supra* note 1, at 103. Dr. Colin A. Ross, another well-known authority, has echoed the same warning:

The most important thing to understand is that alter personalities are not people. That might seem obvious, but it is a truth one can lose sight of during the therapy. Alter personalities are highly stylized enactments of inner conflicts, drives, memories, and feelings. At the same time they are dissociated packets of behavior developed for transaction with the outside world. They are fragmented parts of one person: There is only one person. The patient's conviction that there is more than one person in her is a dissociative delusion and should not be compounded by a *folie à deux* on the part of the therapist.

ROSS, *supra* note 4, at 109.

93. Refusing to buy into the witness's delusions of separateness has an added advantage. It reduces the danger that the theatrical features of this disorder will take over the trial, distracting jurors. On the other hand, lawyers and judges will need to be flexible. Some witnesses may become confused if treated this way. A psychological evaluation will help establish how much reality the witness can tolerate.

94. Multiples will often need to switch states while testifying. See *infra* notes 96-104 and accompanying text. Mentioning a state by name and asking to speak to it will usually facilitate switches. "I would like to speak to the state you call 'Jane.'" PUTNAM, *supra* note 1, at 91-93 (stating the importance of asking for each alter specifically).

2. "Jane, You testified yesterday in the state you call 'Ann' that"

The first exchange validates the witness's delusion that she and Ann are different people. The second exchange, while acknowledging Jane's perspective, does not agree with it. The questioner asserts the belief that Jane and Ann are the same person.

Does it matter how the witness is addressed? It might. Telling a multiple she is accountable for everything she knows while, at the same time, pretending that each identity is a different person sends a double message that is confusing. Multiples are used to having people say one thing and do something else. They respond better when people act in a straight-forward and consistent fashion. If multiples are accountable for their testimony on the assumption that all of their states add up only to one witness, trial participants should treat them this way.

IV. MEMORY COMPARTMENTALIZATION: THE PROBLEM OF CROSS-EXAMINING WITNESSES WITH MULTIPLE PERSONALITY DISORDER

Cross-examining a multiple will be a challenge even for seasoned attorneys.⁹⁵ The challenge will come primarily from two features associated with MPD: memory compartmentalization and switching.⁹⁶

Multiples have compartmentalized minds.⁹⁷ Their powers of recall will

95. See David Hamilton & Joann Ondrovik, *Forensic Issues: May I Speak With . . . ?*, 12 ISSMPD NEWS, Feb. 1994, at 10, 10-11, 15 (discussing the problem of switching and whether the defendant should have the right to speak to parts of the witness's personality system besides the ones that were called out on direct examination).

96. For a discussion of the problems memory compartmentalization will introduce, see *infra* notes 97-114 and accompanying text. For a discussion of covert switches, see *infra* notes 115-19 and accompanying text.

97. No one has total access to the information stored in their memory. Something in the present cognitive/perceptual context must match the stored information to stimulate retrieval mechanisms. See, e.g., Laird S. Chermak and Fergus I. Craik, *The Effects of Elaboration of Processing at Encoding and Retrieval: Trace Distinctiveness and Recovery of Initial Context*, in *LEVELS OF PROCESS IN HUMAN MEMORY* 2, 5-7 (Laird S. Chermak & Fergus I. Craik eds., 1977); Norman E. Spear & Christian W. Mueller, *Consolidation as a Function of Retrieval*, in *MEMORY CONSOLIDATION: PSYCHOBIOLOGY OF COGNITION* 111 (Herbert Weingartner & Elizabeth S. Parker eds., 1984). This explains the phenomenon when, for example, a long-forgotten friend comes to mind when passing someone on the street who, in some way, resembles her. Consequently, even normal witnesses may need a memory trigger.

depend on the state in control when a question is asked.⁹⁸ Memory compartmentalization results from chronic use of dissociation. When the host feels overwhelmed, it takes refuge inside and other states take over. The states "out" during an incident will be the ones, though not necessarily the only ones,⁹⁹ who will know what happened.¹⁰⁰ An identity state's memories are normally accessible to a multiple's recall only when that state resumes executive control.¹⁰¹ This means that for effective cross-examination, counsel will need to know which states were out during the incident in order to summon them out again.

Memory compartmentalization will place the defense at a tremendous disadvantage. The extent of the disadvantage can best be explained by comparing the witness's mind to a computer.¹⁰² Imagine a computer with a number of files, one for each identity.¹⁰³ Whenever an identity is

Multiples will have significantly greater difficulty retrieving information than other witnesses, however, because their minds are dissociatively compartmentalized. Each identity has a separate memory registration system for its own experiences, for those events that transpire during periods when it is executive. An identity's memories are normally accessible to a multiple's recall only when that state is again in control. See *infra* notes 98-101 and accompanying text.

98. When a multiple dissociates into an altered consciousness state, memories of experiences during previous periods when this state was executive are now accessible to the multiple's recall. The best explanation for why dissociated memories are accessible to a multiple's recall only when the altered state in which the memories were acquired resumes executive control of the body is that memory retrieval is state-dependent. See *supra* notes 60-62 and accompanying text; *infra* notes 185-91 and accompanying text.

99. Each state will be aware of events that happened during the periods it was executive. Other states may also be aware; MPD amnesia is complex. It is possible for several states to be alert and monitoring the environment at the same time, with or without awareness of each other. See *infra* note 108.

100. "When a personality assumes the body, any experiences in the real world during this period become those of the personality. The personality then has the memories and feelings generated while he or she is in control." BLISS, *supra* note 4, at 132; see *supra* notes 97-99.

101. See *supra* notes 97-100 and accompanying text.

102. See Braun & Sachs, *supra* note 52, at 49. This metaphor depicts how traumatic memories are originally stored; it does not consider the impact of psychotherapy. Psychotherapy strives to break down dissociative memory barriers by promoting memory sharing across identity lines. Extensive memory work in psychotherapy may have taken place before the witness's courtroom appearance. The reintegration of dissociated memories into conscious awareness will be a mixed blessing. While the witness's delivery will be improved, the quality of the recall may not be. The quality will be improved only if the composite restored memory is faithful to the original experience. See *infra* parts VI, VII (discussing the problems of reassembling dissociated memories and reintegrating them into consciousness).

103. See Braun & Sachs, *supra* note 52, at 49. The average personality system has slightly more than 13 identities. PUTNAM, *supra* note 1, at 39. The numbers seem to be related to the developmental period when dissociative fragmentation first begins.

out, interacting with the environment, information gets stored in its file. The file must be brought up and displayed on the screen to retrieve the information.¹⁰⁴ Unlike most computers, this one lacks a file directory listing the names of the files or indicating in which file the particular information is stored.

How does an attorney recover information under such conditions? This will not be a problem for the plaintiff's attorney because she will have already identified the states housing memories necessary to present the plaintiff's side. Yet, these states may not hold the complete memory. They may have missed crucial segments of the incident. This, in turn, may cause them to misunderstand what happened during the part at which they were present. The situation is somewhat like arriving late for a movie. People who arrive late for a movie often misunderstand what is happening. Identity states have an even greater chance of making mistakes because they frequently fail to appreciate that the movie has already started. For an identity who awakes to find a stranger in her bed attempting intercourse and cannot remember inviting him, there is only one explanation; she is the victim of a sexual assault.¹⁰⁵

Cross-examining a state that has misconstrued its experience will be useless if the missing piece of the memory is held by some other state. What happened to the body when the testifying state was not out may be crucial to evaluating the witness's testimony. This information will remain unreachable, however, unless a key can be found to unlock the witness's memory.

The only person who holds a possible key is the witness's psychotherapist.¹⁰⁶ If the witness has been in treatment for an extended period, the

Multiples who suffer their first split very early in life tend to have much larger and more disorganized personality systems than those whose personality fragmentation begins after the age of eight. *Id.* at 127; Kluft, *supra* note 7, at 369-70.

104. See *supra* notes 60-61, 97-102 and accompanying text.

105. Incidents like this are not far-fetched. See *infra* notes 134 and accompanying text.

106. The defense will not be able to obtain the information needed to compensate for the missing file directory through an independent psychological evaluation performed by a defense expert. Modern courts are reluctant to invade the privacy of prosecution witnesses by ordering them to submit to compulsory psychological evaluations. See, e.g., *Commonwealth v. Gibbons*, 393 N.E.2d 400, 405 (Mass. 1979) (placing limitations on judge's ability to order psychiatric examinations in order to "minimize the seriousness of the invasion of the witness's privacy"); *People v. Davis*, 283 N.W.2d 768, 771 (Mich. Ct. App. 1979) (refusing to compel victim to undergo a mental examination); *Gale v. State*, 792 P.2d 570, 575 (Wyo. 1990) (stating that psycho-

therapist is likely to know the names, roles, functions, personality characteristics, and standard behaviors of the witness's identities. This knowledge enables the therapist to have a decent idea about which states are most likely to have been out during a given incident.¹⁰⁷ Moreover, the therapist is also likely to know which states make the best informants. Some states snoop around, eavesdrop, and make it their business to know what is going on elsewhere in the system.¹⁰⁸

logical examination may not be required of victim who is a witness rather than a party); *see also* State v. Donnelly, 798 P.2d 89, 92-93, 94-95 (Mont. 1990) (noting that child witness's right to privacy outweighs the defendant's right to review therapy records where defendant was child's father and should have known the information therein), *overruled on other grounds by* State v. Inlay, 813 P.2d 979 (Mont. 1991). Legislatures in some jurisdictions have even stripped courts of the power to do this. *See, e.g.*, CAL. PENAL CODE § 1112 (West 1985) (denying courts discretion to require witnesses to submit to a psychological examination to assess credibility); ILL. ANN. STAT. ch. 725, para. 5/115-7.1 (Smith-Hurd 1992) (barring courts from ordering mental exam of sexual assault victim). Even if a court could be convinced to order the witness to submit to an evaluation, this examination would not produce the information the defense needs. It takes the patient's trust and years of psychotherapy to acquire the in-depth knowledge needed to figure out which states are most likely to participate in particular types of incidents.

107. Many dissociative disorders experts recommend using maps, diagrams, and blueprints to assemble information about the patient's personality systems. *See, e.g.*, PUTNAM, *supra* note 1, at 210-11; Braun, *supra* note 49, at 14. In the following passage, Dr. Frank Putnam explains the advantages of careful, systematic data collection. One of the mentioned advantages is the ability to predict, based on the patient's behavior and type of incident, which states were probably out during a given incident.

If the list of alters is kept up to date, the therapist will acquire a great deal of valuable information about the size, composition, and structure of the overall personality system [T]he list will indicate something about the perceived roles or functions of the alters *The therapist will . . . have some idea of which alters are likely to be responsible for specific pathological or dangerous behaviors.*

PUTNAM, *supra* note 1, at 143 (emphasis added).

108. In MPD, there can be pockets of interpersonality awareness in some parts of the system and rigid memory barriers in others. *See, e.g.*, BLISS, *supra* note 4, at 140-41; PUTNAM, *supra* note 1, at 114-15; PUTNAM, *Recent Research*, *supra* note 49, at 494-95; Braun, *supra* note 49, at xiv; Kluft, *supra* note 37, at 560-65. MPD amnesia has a highly complex nature. "Individuals with this disorder experience frequent gaps in memory for personal history, both remote and recent. The amnesia is frequently asymmetrical. The more passive identities tend to have more constricted memories, whereas the more hostile, controlling, or "protector" identities have more complete memories." DSM-IV, *supra* note 9, at 484-85.

Many systems have "historians" who claim to maintain complete records of the patient's life history and current events. In the NIMH survey, over 75% of the patients had at least one alter who claimed this knowledge. PUTNAM, *supra* note 1, at 114-15. The therapist is also likely to know which states have the most inclusive powers of memory. This information will be extremely helpful to the defense.

The witness's psychotherapist is the only person who has the information the defense will need to figure out which states to cross-examine. Yet, this will pose a problem. Most jurisdictions confer a testimonial privilege on communications made between a patient and psychotherapist.¹⁰⁹ While the information the defense will need is technically cov-

109. Some form of psychotherapist-patient privilege is recognized by statute in more than 40 states. See Jonathan Baumoel, Comment, *The Beginning of the End for the Psychotherapist-Patient Privilege*, 60 U. CIN. L. REV. 797, 802 (1992). For a summary of privilege laws, see Barbara W. Weiner, *Provider-Patient Relations: Confidentiality and Liability*, in *THE MENTALLY DISABLED AND THE LAW* 559, 592-96 (Samuel Jan Brakel et al. eds., 3d ed. 1985). See generally Samuel J. Knapp et al., *Privileged Communications for Psychotherapists in Pennsylvania: A Time for Statutory Reform*, 60 TEMP. L.Q. 267 (1987) (outlining the applicable law for mental health professionals); Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597 (1980) (discussing the application of the attorney-client privilege to psychiatrists and their patients); Steven R. Smith, *Medical and Psychotherapy Privileges and Confidentiality: On Giving with One Hand and Removing with the Other*, 75 KY. L.J. 473 (1986) (discussing the inconsistent protection afforded to psychotherapy patients); *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1471-1500, 1530-63 (1985) (considering the theories and justifications for privileged communications in general and discussing medical and counseling privileges) [hereinafter *Developments in the Law*]; William Hague, Comment, *The Psychotherapist-Patient Privilege in Washington: Extending the Privilege to Community Mental Health Clinics*, 58 WASH. L. REV. 565 (1983) (discussing the current structure of psychotherapist-privilege laws in Washington); Kerry L. Morse, Comment, *A Uniform Testimonial Privilege for Mental Health Professionals*, 51 OHIO ST. L.J. 741 (1990) (discussing the current law on mental health privileges). Privilege statutes operate to protect socially important relationships by allowing relevant and probative evidence to be withheld from the jury. Privilege, consequently, is purchased at the cost of reduced accuracy in fact-finding. See, e.g., *United States v. Tsinnjinnie*, 601 F.2d 1035, 1038 (9th Cir. 1979) ("Witness's privileges are inherent barriers to the fact-finding mission of trial courts. They operate to exclude relevant, probative evidence and run counter to the general proposition that each person must present all of the relevant evidence within his or her grasp."), *cert. denied*, 445 U.S. 966 (1980).

Two justifications are commonly given for recognizing a psychotherapist-patient privilege: the utilitarian justification and the privacy rationale. The utilitarian justification focuses on the damage that will be done to the effectiveness of treatment if privilege is not recognized. It forecasts that, without protection of privilege, patients will withhold information needed for their cures. See, e.g., Knapp et al., *supra*, at 8-12; Smith, *supra*, at 477-78; *Developments in the Law*, *supra*, at 1471-80; Hague, *supra*, at 568-72. The privacy rationale focuses on the damage done to the patient in the courtroom from having her most intimate and private matters made public. See, e.g., Steven R. Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1, 48-50, 59-60 (1980); *Developments in the Law*, *supra*, at 1480-83.

The concerns behind the utilitarian justification for privilege are overstated. A survey conducted by Professors Shuman and Weiner several years ago indicates that

ered by privilege,¹¹⁰ courts would misapply the privilege doctrine by al-

most patients are unaware of the law of privilege; consequently, privilege has little impact on patients' behavior. See Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 920, 924-25 (1982); see also Paul S. Applebaum et al., *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 109 (1984); Ralph Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope*, 23 CATH. U. L. REV. 649, 650 (1974); 25 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5522 (1990). Considering that millions of Americans attend support groups meetings where they reveal their most intimate secrets to rooms full of strangers and that patients prosper equally well in countries that do not recognize privilege, the claim that privilege is essential to effective treatment is hard to believe.

Protection of privacy, the second justification for recognizing a psychotherapy-patient privilege, carries little force for patients who elect to air matters that were the focus of therapy in a public courtroom. By making these matters public, the patients show, by their conduct, that privacy is not the most important consideration for them.

110. Psychotherapy-patient privilege statutes are riddled with exceptions. See, e.g., Smith, *supra* note 109, at 502. None of the exceptions give criminal defendants the right to obtain clinical information about prosecution witnesses. For a summary of existing exceptions, see, e.g., Smith, *supra* note 109, at 508-22 and Weiner, *supra* note 109, at 560-70, 592-96.

Blocked by privilege statutes, criminal defense attorneys sometimes offer constitutional arguments to support their discovery requests. In *Pennsylvania v. Ritchie*, the Supreme Court considered whether the Sixth Amendment Confrontation Clause confers a constitutional right to discover information covered by a testimonial privilege. 480 U.S. 39, 45 (1987) (plurality decision). The defendant contended that he had a Sixth Amendment right to discover a confidential child abuse investigative report on the grounds that the information was necessary for effective cross-examination. *Id.* at 51. The Supreme Court, in a plurality opinion, rejected this argument, stating that the Sixth Amendment is purely a trial right. *Id.* at 52. It guarantees the right to cross-examine in court, but not the right to engage in pretrial discovery to make cross-examination more effective. *Id.* at 52-53. While rejecting the Sixth Amendment claim, the *Ritchie* Court did recognize a limited Fourteenth Amendment claim. *Id.* at 58. The Fourteenth Amendment places a duty on the government to disclose information in its possession to the accused if the information is "material to guilt or punishment." *Id.* at 57.

The requirement that the information be in the government's possession limits the Fourteenth Amendment's usefulness in forcing production of a prosecution witness's therapy records. See, e.g., *People v. Overton*, 759 P.2d 772, 774 (Colo. Ct. App. 1988); *People v. Foggy*, 521 N.E.2d 86, 92 (Ill. App. Ct.), *cert. denied*, 486 U.S. 1047 (1988); *State v. Reynolds*, 792 P.2d 1111, 1115 (Mont. 1990); *Commonwealth v. Kyle*, 533 A.2d 120, 125-29 (Pa. Super. Ct. 1987), *appeal denied*, 541 A.2d 744 (Pa. 1988); cf. *People v. Caplan*, 238 Cal. Rptr. 478, 487 (Ct. App. 1987) (holding the defendant is entitled to discovery that aids his defense and reversing and remanding the case). Courts have, nevertheless, occasionally stretched *Ritchie*, particularly when faced with strong showings of need. See, e.g., *Kirby v. State*, 581 So. 2d 1136, 1141 (Ala. Crim. App. 1990); *State ex rel. Romley v. Superior Court*, 836 P.2d 445, 453-54 (Ariz. Ct. App. 1992); *People v. Boyette*, 247 Cal. Rptr. 795, 801 (Ct. App. 1988); *State v. D'Ambrosia*, 561 A.2d 422, 428 (Conn. 1989), *cert. denied*, 493 U.S. 1063 (1990);

lowing a witness who has already testified on direct examination to decide how much of her memory and powers of recall will be open to cross-examination.¹¹¹ The judge should balance the witness's treatment

Bobo v. State, 349 S.E.2d 690, 694 (Ga. 1986); *State v. Shiffra*, 499 N.W.2d 719, 724-25 (Wis. Ct. App. 1993). Interestingly, in two of the cases where the defense succeeded in gaining access to the witness's therapy records, the witness had MPD. See *Romley*, 836 P.2d at 450; *Shiffra*, 499 N.W.2d at 723 (describing MPD as "post-traumatic stress disorder" caused by childhood incest). But see *State v. Donnelly*, 798 P.2d 89, 92-95 (Mont. 1990) (noting that child witness's right to privacy outweighs the defendant's right to review therapy records where defendant was child's father and should have known the information therein), *overruled on other grounds by State v. Imlay*, 813 P.2d 979 (Mont. 1991).

111. One way the legal system deals with witnesses who refuse to be cross-examined is by striking their testimony on direct examination. See, e.g., *Commonwealth v. Kirouac*, 542 N.E.2d 270, 273 (Mass. 1989); *Commonwealth v. Santiago*, 567 N.E.2d 943, 952 (Mass. Ct. App.), *review denied*, 571 N.E.2d 28 (1991); see also *Bagby v. Kuhlman*, 932 F.2d 131, 135 (2d Cir.) (dicta), *cert. denied*, 502 U.S. 926 (1991). Even though a multiple's refusal to release clinical records is slightly different, the legal system would scarcely tolerate a deaf witness thwarting cross-examination by refusing to wear a hearing-aid. If a witness has control over whether she can be cross-examined and refuses to cooperate, her testimony should be stricken, at least in cases where cross-examination might change the outcome.

A Georgia court considered a related issue in *Dorsey v. State*, 426 S.E.2d 224 (Ga. Ct. App. 1992). After an alternate identity-state called "Little Wendy" testified on direct examination, this state disappeared and the witness could no longer remember her former testimony. *Id.* at 228. The defense asked for a mistrial. *Id.* The prosecutor, nevertheless, succeeded in persuading "Little Wendy" to come out again. The defense refused to cross-examine the witness, maintaining that a witness who needs to enter a dissociative state to remember her former testimony is incompetent. *Id.* at 226-28. The Georgia Court rejected this argument, but, nevertheless, observed:

At Mr. Dorsey's trial, each of the three personalities that appeared and testified—Big Wendy, Little Wendy and Trouble—was made available for cross-examination, but Mr. Dorsey's counsel chose not to ask any questions based on his position that testimony from a witness in a dissociative state was not admissible and that the victim was not competent to testify. From these facts in the record, we conclude appellants had ample opportunity to cross-examine the witness in each dissociative state in which she testified and *emphasize that we probably would have been compelled to reach a different conclusion had appellants not been given this opportunity.*

Id. at 228 (emphasis added).

In the quoted passage, the Georgia court was concerned with protecting the defense's right to cross-examine a state that had testified on direct. The defendant's interest in cross-examination, however, should not be limited to states testifying on direct because these states may not possess the information the defense needs. While the Georgia court was correct in assuming that the inability to cross-examine a multiple might, in an appropriate case, afford grounds for excluding testimony, the court's

interests against the defendant's need for cross-examination. Because of the danger of distorted recall,¹¹² the need for cross-examination will be greatest when the court lacks independent corroboration. Without corroboration, determining the reliability of a multiple's testimony will be difficult.¹¹³ No one's fate should be decided based on testimony of unknown reliability that cannot be cross-examined.¹¹⁴

Multiples suffer from another problem that can complicate cross-examination. They dissociate (i.e., switch identities) when they are exposed to stress beyond their ability to cope.¹¹⁵ Since the courtroom atmosphere is likely to be stressful, the defense may have difficulty hanging on to the desired state.¹¹⁶ Transitions from one state to another can be rapid, so rapid that one state can disappear in the middle of a sentence, and another take over to complete it.¹¹⁷

concerns were stated too narrowly. In any case where cross-examination might change the outcome, the court should give the witness a choice to release clinical information or suffer exclusion of testimony.

112. See *infra* parts V-VII.

113. Four years ago, James Dorsey, a scholar, historian, Sunday school teacher, and one of the most respected members of a small Georgia community, and his wife, a high school guidance counselor, were convicted of rape and aggravated sodomy based on the testimony of a young multiple who moved into their home after graduating high school and lived with them for five years as their babysitter. *Dorsey*, 426 S.E.2d at 225-26. During this period, "[s]he worked, dated and had many aspect of an apparently normal life." *Id.* at 226. While the Dorseys admitted being sexually involved with the young lady, they claimed that the involvement was consensual. *Id.* As with most sexual victimization charges, no one but the immediate parties will ever know what really happened. Yet, several explanations other than historic truth could account for the young woman's belief that she had been raped. Her belief could represent the mistaken impression of an identity who failed to appreciate that some other state had consented, hypnotic hallucinations, flashbacks to scenes from the witness's childhood, memories borrowed from the themes of books, movies or television programs, or memories unwittingly implanted during therapy. See *infra* notes 125-35 (mistaken impressions about what happened), 139-50 (hypnotic hallucinations), 151-53 (flashbacks), 155 (borrowed memories) and accompanying text; parts VI and VII (memories unwittingly implanted during therapy). It is impossible to say whether justice was served at the *Dorsey* trial. The chances of justice being served are increased if judges are aware of risks inherent in a multiple's testimony when they rule on defense requests for clinical information.

114. Nonetheless, discovery requests should be carefully screened to make sure the defense genuinely desires the information and is not using the request to intimidate an emotionally fragile witness into dropping the suit.

115. PUTNAM, *supra* note 1, at 83.

116. For a description of the frustrations in trying to take a multiple's deposition, see Hamilton & Ondrovik, *supra* note 95. In *Dorsey*, the witness switched after testifying on direct examination and was unable to remember her former testimony. *Dorsey*, 426 S.E.2d at 226-28. The court denied the defense's motion for a mistrial because the prosecutor was successful in persuading the desired state to come back out again. *Id.* at 228.

117. While a switch can consume up to five minutes, most occur in a few seconds

There are three signals that indicate a possible switch: physical manifestations, changes in demeanor and carriage, and amnesia. Common physical manifestations include eyelid flutters, eyeball rolls, rapid blinking, twitching, startle responses, shudders, and facial grimaces.¹¹⁸ In addition, switches are often accompanied by subtle changes in carriage and demeanor, such as a transition from responsive to guarded or from age-appropriate to infantile. Amnesia, the last indicator, will be the easiest to recognize.¹¹⁹ An identity often has little awareness of events before it assumes executive control. Consequently, amnesia can be used as a test for a covert change in state. When a switch is suspected, counsel should ask the witness to summarize the testimony just given, repeat the last question, or provide some other information that will indicate whether the witness is maintaining a continuous, uninterrupted psychological presence.

V. HALLUCINATIONS, FLASHBACKS, AND OTHER CAUSES OF MEMORY DISTORTION

No witness has a perfect memory.¹²⁰ The memories of most witnesses probably seem better than they really are because there are no photographs of the event against which to compare their testimony. When examined closely, multiples' memories may seem flawed. Yet, the problem is not that multiples have poor memories; on the contrary, multiples have extraordinary powers of concentration and absorb and store information "in the manner that a sponge absorbs water."¹²¹ They can often

or less. PUTNAM, *supra* note 1, at 120-21; Richard J. Lowenstein, *An Office Mental Status Examination for Complex Chronic Dissociative Symptoms and Multiple Personality Disorder*, 14 PSYCHIATRIC CLINICS OF N. AM. 567, 598-600 (1991).

118. See, e.g., BLISS, *supra* note 4, at 125-26; PUTNAM, *supra* note 1, at 120-21.

119. PUTNAM, *supra* note 1, at 83-84; Lowenstein, *supra* note 117, at 599-600.

120. The fallibility of eyewitness memory has been documented in numerous research experiments. See, e.g., ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979); ELIZABETH LOFTUS & JAMES F. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (1987); GARY L. WELLS & ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES (1984); Elizabeth F. Loftus, *Eyewitness Testimony: Psychological Research and Legal Thought*, in 3 CRIME AND JUSTICE ANNUAL REV. OF RES. (M. Tonry & N. Morris eds., 1981); see also Michael W. Mullane, *The Truthsayer and the Court: Expert Testimony on Credibility*, 43 ME. L. REV. 53 (1991); Christopher M. Walters, Comment, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402 (1985); Fredrich D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969 (1977).

121. George K. Ganaway, *Historical Versus Narrative Truth: Clarifying the Role of*

remember events that took place years before with uncanny detail and accuracy. Nonetheless, their memory performance is erratic. Dr. Richard Kluft warns that the memories multiples report may contain a mixture of everything from "photographic recall" to "confabulation, screen phenomena, confusion between dreams or fantasies and reality, irregular recollections, and willful misrepresentations."¹²²

MPD can impair recall in various ways. Dissociation can fragment experience and parcel segments of memory out among several states. Fragmentation of experience can produce cognitive and perceptual errors. Thus, a state present during only a part of the experience can misconstrue what happened.¹²³ Therapy can aggravate this problem. Mistakes can be made in the process of matching memory parts up and putting them together again.¹²⁴ To determine the accuracy of a witness's testimony, it is helpful to examine mechanisms that can falsify a multiple's recall.

A. *Internal Foul Play*

Many multiples are unaware of having other identities.¹²⁵ When things go wrong in their lives, they naturally look beyond themselves for an explanation. Nevertheless, this disorder lends itself to self-harassment. Consequently, a multiple's misfortunes may sometimes be due to internal foul play.

Multiples re-enact childhood abuses through internal self-persecution.¹²⁶ Many personal systems have identities whose sole function is to

Exogenous Trauma in the Etiology of MPD and Its Variants, 2 DISSOCIATION: PROGRESS IN THE DISSOCIATIVE DISORDERS 205, 208 (1989).

122. Richard P. Kluft, *Treatment of Multiple Personality Disorder: A Study of 33 Cases*, 7 PSYCHIATRIC CLINICS OF N. AM. 9, 14 (1984). In the passage below, Dr. Kluft evaluates the strengths and weaknesses of a multiple's memory:

The experiential world of highly dissociation-prone or hypnotizable individuals reflects the positive and negative potentials of this trait. They may excel in concentrating, have excellent memories, and experience emotions with great intensity. Their capacity to use fantasy in the service of creativity may be noteworthy. However, they are prone to bypass inconsistencies and incongruities [T]hey will endorse experiences that bear resemblance to items on standard measures of hypnotizability but are usually considered signs of psychosis, that is, hallucinations and passive influence experiences.

Kluft, *supra* note 37, at 559-60.

123. See *infra* notes 125-35 and accompanying text.

124. See *infra* parts VI and VII.

125. PUTNAM, *supra* note 1, at 107, 114, 151. "Multiple" is used here in the sense of "host." The host is the state in control most of the time and is normally the state that seeks treatment. See *supra* note 67 and accompanying text.

126. See, e.g., PUTNAM, *supra* note 1, at 108, 178-80, 206-07.

torment the host.¹²⁷ Internal persecutors do terrible things; they run up bills, get multiples into legal scrapes, humiliate them socially, and even mutilate their bodies.¹²⁸ When unexplainable mishaps occur, the host becomes confused and assumes that outsiders are responsible. Several years ago, an assistant United States Attorney fell victim to internal foul play.¹²⁹ While representing the government, she received threatening letters¹³⁰ and assumed that the letters had been sent by a terrorist whom she was trying to extradite.¹³¹ When an investigation revealed that she had sent these letters to herself, her self-persecutors triumphed. The young woman's career was destroyed.¹³²

Ambushes set up for the host sometimes catch the wrong quarry.¹³³ In the following passage, Dr. Frank Putnam explains how unsuspecting strangers can get entangled in internal intrigues:

A common scenario reported by female MPD patients is for a promiscuous alter to pick up a strange man, set up an intimate and often masochistic situation, and then vanish, leaving the frightened and usually sexually frigid host personality to contend with the stranger's advances. Not unexpectedly, the host interprets the outcome of this internal setup as rape.¹³⁴

When asked why it had set up a masochistic situation and then vanished, one promiscuous identity told Dr. Putnam: "I had to take it for her [the host] when she was little—now I want her to feel what it was like."¹³⁵

127. See, e.g., *id.* at 108.

128. Suicide attempts and self-lacerations often represent plots by self-persecutors to harm the host. *Id.* at 108. Delusions of separateness can be so complete that one state may try to murder another, oblivious to the personal consequences. *Id.*

129. See *Insanity Ruling for Fake Death Threat*, S.F. CHRON., Mar. 11, 1989, at A6.

130. Threats like this are reasonably common. See, e.g., PUTNAM, *supra* note 1, at 206 (reviewing common manifestations of internal persecution). One of the authors had a patient who began receiving threatening messages on her telephone answering system from a strange caller who seemed to know everything about her and her children. She became terrified that someone was following her. The strange caller turned out to be a self-persecutory identity.

131. See *Insanity Ruling for Fake Death Threat*, *supra* note 129, at A6.

132. *Id.* Criminal charges were also brought against her. They were dropped when the government consented to accept her insanity plea. *Id.*

133. PUTNAM, *supra* note 1, at 111, 179.

134. *Id.* at 111.

135. *Id.* at 179.

B. Confabulation

Confabulation is an unconscious process in which gaps in memory are filled through the insertion of imagined experiences that the subject believes are real.¹³⁶ The human mind naturally tends to insert missing details needed to round out actual memories. The minds of multiples, however, are capable of confabulating on a different plane. Their minds can create memories of experiences believed to have gone on for long periods, perhaps weeks or months. Confabulation serves to smooth out time discontinuities and to eliminate the terror of, for example, going to sleep in December and waking up in July, with no recollection of what happened in between.¹³⁷ Waking up after several months of being dormant, the host may believe that it has been away on a vacation, in the hospital, or engaged in some internally manufactured experience for which it will have a full set of sham memories. One of our colleagues tells of a patient who entered treatment with richly detailed memories of normal childhood interactions with his mother. As the therapy progressed, these memories disintegrated and the patient discovered that his mother had in fact been distant and cold, and that he had almost no interactions with her. The experiences the patient remembered turned out to be sham memories confabulated to disguise lost periods of childhood when other states were in control.¹³⁸

C. Hallucinations and Flashbacks

Multiples are highly hypnotizable.¹³⁹ High hypnotic capacity is accompanied by several traits that can cause internal self-contamination of memory.¹⁴⁰ People who are highly hypnotizable tend to fantasize a great

136. See, e.g., Harold I. Kaplan & Benjamin J. Sadock, *Typical Signs and Symptoms of Psychiatric Illness*, in 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 499, 501 (Kaplan & Sadock eds., 4th ed. 1985).

137. PUTNAM, *supra* note 1, at 73-74.

138. Interview with Dr. Elizabeth Bowman, Assistant Professor, Indiana University School of Medicine, in Louisville, Ky. (July 3, 1993).

139. See *supra* notes 49-54 and accompanying text.

140. Several cognitive changes are associated with hypnotic states. These changes include an increase in imaginative capacity and willingness to accept suggestion, as well as a reduction in critical judgment. See, e.g., BLISS, *supra* note 4, at 98-99; HILGARD, *supra* note 38, at 163-65; Ganaway, *supra* note 121, at 208-09. These changes do not occur to the same extent in all subjects. The amount of change varies with the subject's hypnotic capacity. See, e.g., HILGARD, *supra* note 38, at 156-84; HILGARD, *supra* note 49, at 88, 219-24, 270-74, 285-87. Gross distortions of reality are likely to occur only in subjects who are highly hypnotizable. See HILGARD, *supra* note 38, at 91-100, 156-184; Ganaway, *supra* note 121, at 208-14. The traits that prompt distortions during hypnosis are part of a subject's own personality. See, e.g., BLISS, *supra* note 4, at 70, 77-81, 94-95; Susan M. Powers, *Fantasy Proneness and the UFO*

deal of the time.¹⁴¹ Yet, their fantasies are not like the daydreams of ordinary people. Their mental imagery is intensely vivid, detailed, and life-like.¹⁴² A multiple can hallucinate the sound of a gun, smell its smoke, feel the pain of the bullet entering his body, and watch his blood gush from his chest.¹⁴³ His mental imagery can be so frighteningly real that he may call his therapist in a panic to report nonexistent injuries.¹⁴⁴

On reason why multiples mistake their fantasies for reality is that they are unaware of slipping into a trance.¹⁴⁵ Trances differ from dreams. Fantasies experienced in dreams seem intensely real at the time; however, dreams are not mistaken for reality because normally reality-testing

Abduction Phenomenon, 4 DISSOCIATION: PROGRESS IN THE DISSOCIATIVE DISORDERS 46, 46-48 (1991).

141. Dr. Josephine Hilgard, who has spent years studying the childhood backgrounds and personality characteristics of people who are highly hypnotizable, asserts: "As we look at the various kinds of involvements found among the hypnotically susceptible, we cannot but be impressed by the capacity of the hypnotizable person to set aside reality and to live in a world of vivid fantasy." HILGARD, *supra* note 49, at 88. This capacity is exhibited across many aspects of a multiple's life, including the creation of alter personality systems. Dr. Richard Kluft reports treating a patient with a personality system configured on J.R.R. Tolkien's *Lord of the Rings*, complete with hobbits, orcs, and wizards. See Kluft, *supra* note 12, at 51. Dr. George Ganaway mentions finding identities that included everything from demons and angels to tigers, gorillas, chickens, lobsters, and a unicorn. See Ganaway, *supra* note 121, at 209.

142. See, e.g., BLISS, *supra* note 4, at 73-74. In the following passage, Dr. Eugene Bliss describes the fantasies of the highly hypnotizable.

Many have vivid sexual fantasies, so realistic that three-quarters achieve orgasms in this way. When they are asked to imagine a dog, they will see it run into the room and feel it lick their faces. Furthermore, "they will tend to confuse memories of their fantasies with real world events." Many will become ill when they see violence on television or the movies because the experience can become so personal and real. Most have had illness or physical symptoms directly related to their thoughts, fantasies, and memories. Practically all have had "extra-sensory" occurrences, precognitive dreams, and out-of-body experiences.

Id. at 77.

143. See, e.g., BLISS, *supra* note 4, at 74, 79.

144. Dr. George Ganaway mentions an incident in which a multiple telephoned her psychiatrist to report that a self-persecutory identity had just slashed her vagina with a razor and that she was bleeding profusely. An emergency gynecological exam revealed that the whole incident was imagined. See Ganaway, *supra* note 121, at 210.

145. See, e.g., BLISS, *supra* note 4, at 79-80. People who are highly hypnotizable do not need formal induction to experience hypnosis. They slip into trance whenever their attention becomes overly concentrated and focused. This can happen from reading a book, watching a television program, or even staring too long into a pond. *Id.* at 67-78.

is restored when the dreamer awakes and realizes that the experience was just a dream. The existence of clear boundaries between sleep and waking states thus preserves reality-testing. On the other hand, there are no clear boundaries between waking states and trance states. Unaware that they are slipping into the hypnotic realm, multiples have nothing to help them preserve reality-testing.¹⁴⁶

Once inside a trance, the line between internal and external reality vanishes and fantasies come alive.¹⁴⁷ Multiples experience their past memories with realistic intensity; they can also experience their hypnotic fantasies with the same realistic intensity.¹⁴⁸ Their real memories and hypnotic fantasies often seem equally real to them.¹⁴⁹ The power of hyp-

146. A high percentage of patients with this disorder, perhaps as many as one-third, believe that they were childhood victims of satanic ritual abuse (SRA). See, e.g., Kluft, *supra* note 12, at 50; see also Philip M. Coons & Finlay Grier, *Factitious Disorder (Munchausen Type) Involving Allegations of Ritual Satanic Abuse: A Case Report*, 3 DISSOCIATION: PROGRESS IN THE DISSOCIATIVE DISORDERS 177, 177-78 (1990) (discussing specific case of woman diagnosed with MPD claiming to have been involved in a satanic cult); *supra* notes 12, 31. Patients recall being tortured in caves by people wearing black robes, watching the ceremonial murder of their incestuously conceived babies, participating in acts of cannibalism, and taking part in other harrowing atrocities. Controversy over the historic accuracy of these memories has polarized the MPD treatment community. See Coons & Grier, *supra*, at 177-78; Ganaway, *supra* note 121, at 211-17; Lanning, *supra* note 31, at 172; Powers, *supra* note 140; John Johnson, *County Panel Scrutinized for Satanic Claims Cults: Some Members of Ritual Abuse Task Force Contend That Devil Worshipers Are Poisoning Them*, L.A. TIMES, Dec. 13, 1993, at B1 (listing examples of ritual abuse found in task force handbook); Alfred Lubrano, *Ritual Abuse: Deadly Memories, Are Macabre Tales Fictions or Felonies?*, NEWSDAY, May 10, 1993, at 15 (discussing memories of ritual abuse discovered during therapy); Perry, *supra* note 31. A growing number of dissociative disorders specialists have begun urging restraint in validating unsubstantiated reports of abuse by patients with this disorder. See, e.g., Ganaway, *supra* note 121, at 207; Michael J. Grinfeld & Jesse Reisman, *Childhood Sex Abuse Memories Haunt Victims, Divide Experts: Task Forces to Seek Elusive Truth As Debate Flares*, PSYCHIATRIC TIMES, Aug. 1993, at 2 (quoting Dr. David Spiegel); see also *infra* notes 149, 164, 169.

147. Highly hypnotizable subjects have difficulty maintaining reality-testing when they undergo hypnosis because of the intensity of their inward focus. They become so absorbed in affairs of the mind that they lose track of themselves and external reality; their mental experience is all that exists. See, e.g., BLISS, *supra* note 4, at 105-08. This gives mental experiences a realism that they would not have if the subject's attention were divided between her thought processes and the physical world. *Id.* at 105-06.

148. See, e.g., BLISS, *supra* note 4, at 78-81, 98.

149. A growing number of dissociative disorders experts have begun urging caution in authenticating unsubstantiated MPD abuse reports. See, e.g., Ganaway, *supra* note 121, at 210; Kluft, *supra* note 122, at 13-14; see also *supra* note 146, *infra* note 164. Dr. Frank Putnam warns:

In some cases, specific events or specific versions of an event will have clear fantasy components; in many other cases, the therapist and patient will

notic fantasy is exhibited across numerous aspects of a multiple's life, but nowhere is this power more clearly revealed than in the ability of multiples to assume other identities. Alter personality constellations may include nonhuman creatures, as well as the purely grotesque. In the mysterious realm of the identity, demons, lobsters, and chickens take themselves seriously and five year-old boys are not distressed to inhabit the bodies of middle-aged women.¹⁵⁰

Multiples are vulnerable to another kind of hypnotic experience—flashbacks.¹⁵¹ A fleeting observation or environmental cue can precipitate a flashback.¹⁵² Without warning, the multiple is hurled back in time to relive a past ordeal with all of its original sounds, smells, anguishes, and terrors; even the physical pain of the traumatic event is experienced.¹⁵³ In the following passage, Dr. Frank Putnam describes the agony of relentless flashbacks:

The past and the present intermingle and follow each other in chronological confusion. Flashbacks, with their accompanying distortions of age and body image, send a patient hurtling backwards to relive trauma that seems more vivid now than when it actually occurred Time is discontinuous for multiples. The breaks are more than the simple lapses in continuity produced by the personality switches; inversions and reversals in a patient's sense of time are produced by flashbacks to past events. Reality testing is impaired by the lack of a firm "now" against which to measure what is past and what is present.¹⁵⁴

"Memory borrowing" is another trait connected with high hypnotic capacity. The highly hypnotizable have such intense powers of absorption that when they read a book, watch a television program, or see a

never be sure what actually occurred and what was fantasy. I do not know of any way to sort out truth from fantasy in these cases. One may argue that "it is all real to the patient" and therefore the actual veracity does not matter, but . . . "there are times when it seems to be of prime importance to ascertain the truth."

PUTNAM, *supra* note 1, at 245.

150. *See supra* note 141.

151. Flashbacks are associated with posttraumatic stress disorders. PUTNAM, *supra* note 1, at 236. They can be cued by sights, sounds, smells, behaviors, and other normal everyday objects or experiences. *Id.* at 237-38. During flashbacks, dissociative memory barriers break down and traumatic memories flood back into consciousness. Past events are experienced as if they are happening in the present. Hypnotic flashbacks have all the sensory vividness and intensity of a present experience. *See, e.g.,* BLISS, *supra* note 4, at 78-79.

152. PUTNAM, *supra* note 1, at 237-38.

153. *See, e.g.,* BLISS, *supra* note 4, at 79, 107-08.

154. PUTNAM, *supra* note 1, at 177.

movie, they lose track of themselves and their surroundings, identify with the characters, and undergo vicarious experiences.¹⁵⁵ Their vicarious experiences are so intensely real that they may later forget the source of their memory and recall the experience as something that actually happened to them.

VI. TESTIMONY BASED ON "RESTORED MEMORY"

A multiple's testimony will often be based on "restored memories," memories that have been recovered and pieced together in therapy rather than the multiple's original unspoiled memory impressions. This Part describes how dissociated memories are restored.

When eight-year-old Sue "blacked out" while being sexually abused by her father, "Ann" (an alternate identity-state) rushed to the scene where she saw a man she had never seen before molesting Sue. "Ann" struggled with the stranger and tried to push him away. When the stranger overpowered "Ann," she became terrified and fled via dissociation. "Barbara," another alter, was watching in the background.¹⁵⁶ "Barbara" recognized Sue's father as the molester, but decided against getting involved because she felt Sue had brought this misfortune upon herself. A few minutes later "Carol" arrived. By this time Sue was asleep, cradled in her father's arms, and "Carol" thought to herself, "What a lucky girl Sue is to have such a warm and loving father."¹⁵⁷ Now imagine that Sue was constantly

155. See, e.g., BLISS, *supra* note 4, at 77; HILGARD, *supra* note 38, at 104-06, 160-61; HILGARD, *supra* note 49, at 270-74; Ganaway, *supra* note 121, at 208-09.

156. Several states can share consciousness at the same time. PUTNAM, *supra* note 1, at 114-15.

157. Overwhelming events may be too much for any one state to endure. The experience may be divided up and parceled out among several states, each of which is aware of only part of what happened. Dissociative fragmentation of experience can occur along several lines. Sequential fragmentation is one pattern. As each successive state becomes overwhelmed, reinforcements are sent in to take over. Thus, Identity A may be aware of events leading up to a rape, Identity B of events happening afterwards, and a whole cadre of identities may be aware of bits and pieces of what happened in between. PUTNAM, *supra* note 1, at 125. Aspects of the experience, such as knowledge, emotions, sensations, and behavior, can also be divided up and rearranged. Thus, Identity A may have *intellectual knowledge* of an event, but be uncertain whether this knowledge amounts to a memory because the usual feelings accompanying such events are lacking. Identity B may feel an overpowering sense of rage, terror, or grief, but lack insight into the origin of these *feelings*. Identity C may be compulsively driven to engage in *behaviors* constituting a symbolic re-enactment of the event, but have no idea why. *Id.* at 198-200. Dr. Putnam refers to the dissociative parceling out of memories of a single unbearable event among several states as "layering" because information about the event tends to reach the therapist in layers. *Id.* at 124-25. Identities with memories of less terrifying aspects of the experience tend to arrive first, while the others hold back until the therapist has been tested and found trustworthy. *Id.* at 124. "Layering" serves an important defensive purpose—it

abused, physically, sexually, and emotionally, throughout her childhood, and that each time she dissociated, different states were present. Years later, when Sue entered psychotherapy, she remembered none of this. This describes the kind of dissociative memory problems multiples bring into treatment.¹⁵⁸

During the therapy, numerous memory fragments will be collected from the patient's identities.¹⁵⁹ These fragments will be matched up, pieced together, and reassembled into whole memories. The whole memories will then be shared with other parts of the personality system. The MPD treatment model concentrates heavily on memory work.¹⁶⁰ The theory behind this model is, in part, that once the secrets are out and traumatic memories have been shared, memory barriers will no longer be needed. Consequently, they will gradually disappear and personality integration will gradually follow.¹⁶¹

Some memories are recovered relatively intact, but stronger defenses are needed for unbearable memories. It may be necessary to call up

fortifies dissociative defenses by scrambling up memories in ways that make it difficult for the parts to be reassembled and the event later remembered. *Id.* at 125.

158. Most contemporary learning about MPD comes from clinical studies; however, memory research scientists have recently acquired an interest in this area and have begun studying MPD in memory research laboratories. *See, e.g.,* Daniel L. Schacter et al., *Autobiographical Memory in a Case of Multiple Personality*, 98 J. ABNORMAL PSYCHOLOGY 508 (1989). While this development is exciting, research scientists have not yet advanced learning beyond what is already known about this disorder from clinical studies.

159. Identities do not gauge their comings and goings by the therapist's need for information. They have their own agendas. Their arrival is normally triggered by events taking place in the patient's life outside of therapy. *See supra* notes 67-72 and accompanying text. This causes the patient's past to unfold in chronological disarray. *See, e.g.,* PUTNAM, *supra* note 1, at 72-74, 198-200 (noting the difficulty in assembling patients' histories). The task of memory gathering is further complicated by different states giving contradictory accounts of what happened. *Id.* at 72, 245, 248. Inconsistencies are often attributable to different states, present at the event, placing different interpretations on what happened. Dr. Putnam relates a case in which one alter described an episode of incest as a violent rape. *Id.* at 248. Another perceived the incident as an expression of paternal love. *Id.* A third confirmed that the incident involved rape, but described the victim as a total stranger. *Id.* Contradictory reports are not as peculiar as they may seem at first. Events such as incest stir up a mixture of feelings. For victims with integrated psyches, inconsistent attitudes are viewed as a manifestation of ambivalence. With multiples, ambivalence may take another form; different states may have contradictory impressions about what happened. *Id.*

160. For a description of the methods, techniques, and goals of MPD memory work, see PUTNAM, *supra* note 1, at 72-82, 173-74, 197-252.

161. *See id.* at 115.

whole cadres of identities to share the terror and pain by taking up a small piece of the memory. How do MPD therapists help a patient reassemble a childhood that has been dissociatively shattered and ground into bits and pieces? Therapy must proceed very slowly, with great patience, but perhaps not always with 100% accuracy. Dr. Frank Putnam, who heads the National Institute of Mental Health Dissociative Disorders Unit, warns:

This is slow, methodical work. In the beginning, little is going to make sense. The therapist will meet some alters who exhibit powerful affects for which there is little content; other alters have bits and pieces of vivid memory detail, but are unable to place this content into a larger context. This is a large, multidimensional puzzle that the therapist and patient have to assemble one piece at a time. The patient will continually provide clues, but he or she does not know the answer either, and powerful psychic processes are at work that attempt to suppress, distort, or otherwise impair recall of traumas. Time, patience, trust, and working through alter by alter, level by level, will slowly assemble a coherent and chronological picture of the trauma that precipitated and perpetuated the patient's fragmentation into a multiple personality.¹⁶²

In the following passage, Dr. Putnam describes how he helped a patient reassemble a memory of watching her father kill her dog and threaten her with the same fate if she ever disclosed his incestuous activities:

Often one traces memory and affect in a parallel fashion, slowly assembling a coherent whole from the bits and pieces of abreactive fragments. In one patient, for example, the work began with a feeling of overwhelming sick dread that was evoked by the sound of a train. The patient was unable to associate any memories to this stimulus, but the sounds of a passing locomotive or train whistle would result in rapid switching of alters who exhibited affects of fear, horror, grief, and anger, respectively. The angry alter threatened to kill the patient's father because he was a bastard, but provided no other details. The grief-stricken alter mourned the death of a dog who was her only companion on an isolated Midwestern farm. The horrified alter reported watching her father tie her dog to the railroad tracks that passed behind the family farm, and the fearful alter was still bound by the threat that this would happen to her someday. The memory that [ultimately] emerged was of her father taking her pet, tying it to the railroad tracks, and making her watch the yelping dog ground to pieces by a freight train. He threatened that the same would happen to her if she ever revealed his incestuous activities to anyone.¹⁶³

Undertaking a multiple's treatment requires extraordinary patience and skill. For therapists who lack these traits, formulations designed to clarify the past can become acts of creation, rather than acts of discovery.¹⁶⁴

162. *Id.* at 199.

163. *Id.* at 199-200.

164. The possibility of planting false memories during therapy has recently become the center of a storm of controversy. See *supra* note 10; *infra* note 169. The controversy centers on the extent to which the recent sharp rise in childhood sexual abuse allegations is being fueled by therapists who are looking too hard for childhood sexu-

al abuse memories where none exist. See, e.g., Boodman, *The Professional Debate supra* note 10, at Z13; Bonnie Gangelhoff, *A Mental Health Dilemma: Searching for Truths in "Memories,"* HOUSTON POST, June 12, 1994, at E1; Gentry, *supra* note 10, at 1A; Daniel Goleman, *How Reliable Is Your Memory? Coding Process May Hold Answer,* MIAMI HERALD, June 2, 1994, at 1G; Jean L. Griffin, *Specter of False Memories Can Taint Sex Cases,* CHI. TRIB., Nov. 21, 1993, at 1; Gloria Hochman, *Prisoners of Memory: Nothing Rips Families Apart Like Recollections of a Parent's Sexual Abuse, Especially If They're Untrue,* PHILA. INQUIRER, June 6, 1993, at 12 (Magazine); Jacobs, *supra* note 10, at 1; Richard J. Metzner, *A Legitimate Therapy Suffers Rip-Offs; Sexual Abuse: Pressures for Faster, Cost-Effective Therapy Have Contributed to a New Syndrome of False "Recovered Memories,"* L.A. TIMES, Dec. 3, 1993, at B7; Tom Philp, *Recovered-Memory Debate: Quackery or Crime Solver?,* SACRAMENTO BEE, July 24, 1994, at A1; Betsy Rubiner, *Memories Serve, in Court—Repression, Trauma Cases Under Debate,* USA TODAY, Nov. 29, 1993, at 2A; Scanlon, *supra* note 10, at 1D; Thrity Umrigar, *False Memories: Some Call It Suggestion. Others Say It's Backlash. No One Is Really Sure,* AKRON BEACON JOURNAL, Oct. 23, 1994, at E1. This issue is now being discussed at professional conferences, in scientific literature, on talk shows, and in the popular media. See *supra* notes 10-11 and accompanying text; *infra* note 169 and accompanying text. More than 200 books have already been written on this subject. See Elizabeth Brixey, *Conference on Sexual Abuse to Explore False Memory,* WIS. ST. J., Oct. 15, 1994, at C1. Psychologist Michael Yapko wrote a book based on a survey he made of 860 mental health professionals. See MICHAEL D. YAPKO, *SUGGESTIONS OF ABUSE: TRUE AND FALSE MEMORIES OF CHILDHOOD SEXUAL TRAUMA* (1994). His survey was designed to test levels of awareness of how memory operates and the dangers of suggestion in psychotherapy relationships. *Id.* at 20. Based on the results of his survey, Dr. Yapko concluded that many therapists hold erroneous views on the workings of memory, repression, and hypnosis. *Id.* at 61. Further, he found that therapists often practice their profession based on sexual abuse symptom checklists that have no validity and are "sheer myth." *Id.* at 20. Dr. Yapko believes that suggestive techniques and interventions are responsible, in large part, for the present epidemic of remembering incest. *Id.* at 27-29, 31, 89-91.

Dr. Leonore Terr, who served as an expert witness in the highly publicized Franklin-Lipsker recovered-memory murder trial and who is one of the leading spokespersons for the other side, has also written a book. See LEONORE TERR, *UNCHAINED MEMORIES: TRUE STORIES OF TRAUMATIC MEMORIES LOST AND FOUND* (1994). Dr. Terr's research is based on clinical experience with traumatized children and adults. In her book, she attempts to explain how memories of childhood horrors like incest or murder can be repressed and then surface years later, relatively intact and unchanged. She believes that traumatic memories, once buried and repressed, deteriorate very little and when they return are relatively unchanged. *Id.* at 40-41.

The false-memory controversy has spilled over into the courts. Hoards of patients are now filing suits against parents, siblings, teachers, clergy, and others, claiming that they have recently recovered repressed memories of childhood sexual abuse. See *supra* note 12. Parents have begun countersuing therapists for implanting false memories in their children. See generally *supra* note 10-11 (providing authorities that deal with this topic). Children sometimes recant and join with their parents in suing the therapist for malpractice. See, e.g., Jacobs, *supra* note 10, at 1; Knight, *supra*

Multiples are easily influenced by what authority figures tell them. This tendency is related to their high hypnotic capacities.¹⁶⁵ People who are highly hypnotizable have cognitive traits that create abnormal suggestibility.¹⁶⁶ The highly hypnotizable are gifted with spirited imaginations and

note 10, at A6; Salter, *supra* note 10, at A1.

In 1993, the American Psychological Association set up a task force to study the scientific status of repressed and dissociated memories. See Grinfeld & Reisman, *supra* note 146, at 1. After months of study, the team of experts on the task force came to the conclusion that "while it is possible for memories of abuse that have been forgotten for a long time to be remembered . . . [i]t is also possible to construct convincing pseudo-memories for events that never happened." See Carolyn Skorneck, *Group Wary of 'Repressed Memories'*, PHOENIX GAZETTE, Nov. 11, 1994, at A17 (quoting members of the APA task force); see also APA *Issues Report on "Repressed Memories"*, S.F. EXAMINER, Nov. 11, 1994, at B3; Bill Hendrick, *Child Abuse Found To Be 'Pervasive', But False Memories Also Seen As Problem*, ATLANTA J., Nov. 11, 1994, at C1. Consequently, while the debate about false memory continues to rage, answers are nowhere in sight.

165. Hypnotic capacity is a trait that can be measured. A number of tests and scales exist for measuring it. See HILGARD, *supra* note 38, at 257-66; Kanovitz, *supra* note 2, at 1238 n.227. Multiples tend to score higher than any other clinical population. See *supra* note 49.

166. In the following passage, Dr. George Ganaway describes the traits found in the highly hypnotizable that heighten their vulnerability to suggestion:

There is a *posture of trust* in interpersonal situations described by Spiegel as "an intense beguilingly innocent expectation of support from others in a somewhat atavistic, prelinguistic mode . . . that goes beyond reasonable limits to become postured and demanding." This can become a pathological compliance with people in the environment, including the therapist. *Suspension of critical judgment* refers to the readiness to replace current premises and beliefs with new ones without the careful cognitive screening that usually takes place in less hypnotizable persons. This is consistent with another characteristic of this group, *trance logic*, which was originally described by Orne (1959) as the capacity to be unaware of even extreme logical incongruity Highs are known as well for an intense *capacity for concentration* or focused attention, and for dissociating as they are doing so. This trait has been observed and measured experimentally by others as *absorption*. They also possess an *excellent memory*, often being able to store and recall especially visual detail in the manner that a sponge absorbs water. Spiegel notes that this learning is usually uncritical and all-inclusive, which is explained by the above-noted suspension of critical judgment, as well as by another characteristic of this group: a marked propensity to *affiliation with new events* with an almost magnetic attraction.

GANAWAY, *supra* note 121, at 208 (citations omitted). Many sources discuss the cognitive traits and personality characteristics associated with high hypnotic capacity. See BLISS, *supra* note 4, at 66-81, 98-99; HILGARD, *supra* note 38, at 163-65; HILGARD, *supra* note 49; Kanovitz, *supra* note 2, at 1235-38 nn.214-27; Martin T. Orne et al., *Reconstructing Memory Through Hypnosis: Forensic and Clinical Implications*, in HYPNOSIS AND MEMORY 21, 22-25 (Helen M. Pettinati ed., 1988); Spiegel, *supra* note 49, at 90-91; Herbert Spiegel, *The Grade 5 Syndrome: The Highly Hypnotizable Person*, 22 INT'L. J. CLINICAL & EXPERIMENTAL HYPNOSIS 303 (1974); Herbert Spiegel, Keynote Address at the

a natural talent for picturing things.¹⁶⁷ They also tend to be gullible.¹⁶⁸ This combination makes it easy for them to picture suggested events and believe these events have happened.¹⁶⁹ Confusion about the past adds to

Eighth International Conference on Multiple Personality/Dissociative State (Nov. 15, 1991) (audiotape transcript available through Audio Transcript, Ltd.); *see also supra* note 140.

167. *See supra* notes 140-50 and accompanying text.

168. *See supra* notes 140, 166 and accompanying text.

169. Experimental research studies have demonstrated that it is sometimes possible to induce subjects who are highly hypnotizable to believe that they have experienced things that have never happened. *See, e.g.,* Kanovitz, *supra* note 2, at 1237-38, 1237-38 nn.221-26; J. R. Laurence et al., *Duality, Dissociation, and Memory Creation in Highly Hypnotizable Subjects*, 34 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 295 (1986). For a fascinating account of how a highly hypnotizable father was induced to believe that he was a member of a satanic cult and, along with others had perpetrated acts of satanic ritual abuse against all of his children, see Richard J. Ofshe, *Inadvertent Hypnosis During Interrogation: False Confession Due to Dissociative State: Misidentified Multiple Personality and the Satanic Cult Hypothesis*, 40 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 125 (1992); *see also* MICHAEL D. YAPKO, *TRANCEWORK: INTRODUCTION TO THE PRACTICE OF CLASSICAL HYPNOSIS* 256-57 (2d ed. 1990). Dr. Ganaway warns that "MPD patients should be considered at high risk for contamination by pseudomemories in the hands of therapists who unwittingly or not, verbally or otherwise, cue them to respond to the therapists' expectations and needs." *See* Ganaway, *supra* note 121, at 209.

The possibility of false memories being unwittingly implanted during psychotherapy has recently become a subject of growing concern and controversy inside the mental health field. *See* TERR, *supra* note 164, at 161 (noting that "a suggestive technique used on a suggestible patient may wreak all kinds of havoc"); YAPKO, *supra* note 164, at 20-31, 89-91 (claiming that suggestive techniques are largely responsible for false memories); Christine M. Comstock, *Believe It or Not: The Challenge to the Therapist of Patient Memory*, 2 TREATING ABUSE TODAY 12 (1992) (noting that "hypnosis does not guarantee the objective accuracy of the memory"); Frankel, *supra* note 3, at 954 (evaluating recent studies, considering the effect of hypnotism on recall of childhood memories, and concluding that adult reports of childhood trauma are not reliable); Ganaway, *supra* note 121, at 209 (discussing risks of false memories being assimilated during hypnosis); Grinfeld & Reisman, *supra* note 146, at 1 (discussing false memories); Thomas G. Gutheil, *Commentary: True Recollections of a False Memory Case; Ramona Has Ominous Implications for Psychiatrists*, PSYCHIATRIC TIMES, July 1994, at 18 (discussing the first case in which a parent successfully sued his child's psychotherapist for implanting false memories of childhood sexual abuse); *supra* notes 11 (discussing the number of people who may have MSD), 146 (discussing polarization of the field regarding pseudomemories), 164 (discussing controversy over planted memories). The concern has spread, and articles are now regularly appearing in the memory research and legal literatures, as well as in the popular media. *See supra* notes 10-11, 146, 163 and accompanying text; *see also* Kanovitz, *supra* note 2, at 1234-38 (expressing concerns about memory restoring techniques used in psychotherapy, but arguing that hypnosis is no more likely to implant false

a multiple's vulnerability.¹⁷⁰ For patients who are confused, psychotherapy constructions that appear to make sense out of clinical symptoms are hard to resist because they satisfy a natural human longing for answers.¹⁷¹

The protracted and tedious process of gathering traumatic memories, reassembling them, and integrating them into conscious awareness can take place only in professional treatment. Dissociated memories can never be reassembled for the first time on the witness stand. Consequently, juries will rarely have an opportunity to hear and evaluate a multiple's original unspoiled memory impressions. The testimony the jury hears in the courtroom will represent the end product of months, and sometimes years, of psychotherapy. This testimony will be based on dissociated memories that have been gathered, reassembled, and repeatedly reviewed in therapy.¹⁷² Rehearsals tend to harden memory and

memories than other suggestive psychotherapy techniques); Loftus, *supra* note 10, at 518, 534 (urging greater responsibility in encouraging patients to bring restored memory sexual abuse suits); Ofshe, *supra* (describing a case of a false memory confession to satanic ritual abuse); Hollida Wakefield & Ralph Underwager, *Recovered Memories of Alleged Sexual Abuse: Lawsuits Against Parents*, 10 BEHAVIORAL SCI. & L. 483 (1992) (voicing skepticism about authenticity of repressed memory); Marianne Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 WASH. L. REV. 331, 341-42 (1985) (questioning whether therapists possess special expertise in determining historic truth); Walter Young, *Observations on the Fantasy Formation of Multiple Personality Disorder*, 1 DISSOCIATION: PROGRESS IN THE DISSOCIATIVE DISORDERS 13 (1988) (discussing the role of fantasy in the development of MPD).

170. This confusion causes multiples to question the authenticity of their memories. Dr. Putnam observes:

The questions of what really happened and when it happened are usually sources of painful confusion for MPD patients. Confusion of past and present; of real and unreal; and of dream, fantasy and memory may overwhelm them at times. Not uncommonly, patients will retreat into a phase during which they announce that they 'made it all up.' Closer questioning will reveal that they do not know how or why they made it all up, and this assertion will quickly crumble under scrutiny. Understandably, both patients and therapists will wish for some tangible truth as to what really did happen. Sometimes this is forthcoming. Dr. Wilbur was able to meet Sybil's father and hear him confirm the truth of what she had been told (Schreiber, 1974). Unfortunately, in the majority of cases, no hard incontrovertible evidence remains beyond the physical and psychological scarring of the patients.

PUTNAM, *supra* note 1, at 177.

171. See, e.g., DONALD P. SPENCE, NARRATIVE TRUTH AND HISTORIC TRUTH: MEANING AND INTERPRETATION IN PSYCHOANALYSIS 161-214 (1982); YAPKO, *supra* note 164, at 101-11; Kanovitz, *supra* note 2, at 1243-51 (discussing the impact of "talking cures").

172. During therapy, patients repeatedly go over the same disturbing memories. Memories can be changed simply by the process of retelling them. See, e.g., Kanovitz, *supra* note 2, at 1247-50. Repetition can cause reconstruction and hardening of memory. Matters originally vague and hazy can acquire synthetic delineation and sharpness through the process of retelling. On the dangers of changing memory through repeat-

make testimony resistant to cross-examination.¹⁷³

When testimony is based on restored memories, the accuracy of the witness's recall will depend on the therapist's care and skill.¹⁷⁴ Psychotherapy is a human venture and, as such, can sometimes go astray.¹⁷⁵ No defendant should have to answer to accusations based on a therapist's handiwork without an opportunity to explore that handiwork in open court. Oddly enough, this opportunity may be unobtainable if psychotherapy-patient privilege statutes are given literal application.¹⁷⁶ For this reason, courts should not allow patients who bring recovered memory lawsuits to invoke the psychotherapy-patient privilege. Such invocation allows the patient to withhold from jurors information they will need to evaluate the memory's authenticity.

The widely-recognized patient-litigant exception¹⁷⁷ provides the legal justification for overriding the psychotherapy-patient privilege in recovered-memory lawsuits. In bringing suit, a patient who places his mental

ed interviews, see Stephen Landsman, *Reforming Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 U. PITT. L. REV. 547, 554-55 (1984); see also John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705, 708-13 (1987) (discussing the effects on children's memories).

173. See *supra* note 172. The danger of memory hardening from retelling is probably greater in psychotherapy settings than in other contexts because traumatic memories are not simply retold; the past is relived, mourned, and grieved. See, e.g., BRIERE, *supra* note 6, at 85-88 (discussing emotional catharsis). The emotional release intensifies the memories. The risk of memory hardening is one of the reasons why many jurisdictions disqualify witnesses who have experienced pretrial hypnosis from testifying. See *infra* note 198 and accompanying text; see also Martin T. Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311, 332-34 (1979); Peter W. Sheehan, *Confidence, Memory, and Hypnosis*, in HYPNOSIS AND MEMORY 95 (Helen Pettinati ed., 1988).

174. For a discussion of how dissociated memories are retrieved and restored, see *supra* notes 158-62 and accompanying text.

175. See, e.g., SPENCE, *supra* note 171, at 166-74 (discussing how a therapist's erroneous interpretations can reshape a patient's memory); Kanovitz *supra* note 2, at 1234-51 (discussing pseudomemories and "talking cures"); *supra* notes 164, 169 (discussing the risks of memory planting).

176. For a list of sources on this issue, see *supra* notes 109-10.

177. This exception is triggered when patients make their mental states an issue in a lawsuit. By placing their mental states in controversy, the patients waive privilege on this issue. At least 22 states and the District of Columbia recognize the patient-litigation exception in their privilege statutes. See Weiner, *supra* note 109, at 567, 592-96. The courts of numerous other states also recognize the exception. *Id.* at 567. For a more thorough discussion of the patient-litigant exception, see WRIGHT & GRAHAM, *supra* note 109, § 5543.

state in controversy waives the psychotherapy-patient privilege regarding matters the patient has raised.¹⁷⁸ The rationale behind the patient-litigant exception is that, in electing to make private affairs public, the patient no longer retains any privacy, so there is none to protect. It would be unfair to allow the patient to invoke the psychotherapy-patient privilege and thus claim a monopoly on vital information concerning issues that he has raised.¹⁷⁹

The patient-litigant exception does not apply to recovered-memory suits, in that the *litigant* does not place her mental state in issue. Yet, the policy reasons underlying this exception compels its use in this situation.¹⁸⁰ The clinical profession is now engaged in a major debate over the reliability of recovered memories.¹⁸¹ The legal system cannot afford

178. The language of the following Arkansas statute is typical:

There is no privilege under this rule as to a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense.

ARK. CODE ANN. § 16-41-101 (Mitchie 1994) (adopting the Uniform Rules of Evidence).

179. *Harvard Law Review* summarized the policies underlying the patient litigant exception:

[A patient who puts her mental state in issue] has a much-reduced, if not nonexistent, expectation of privacy because she herself brings the issue to public attention. Important fairness considerations justify this exception: an individual who wishes to receive the benefits of the judicial system should not be allowed to impose an additional burden on the system by withholding necessary information central to her claim.

Developments in the Law, *supra* note 109, at 1554; see also WRIGHT & GRAHAM, *supra* note 109, §§ 5543 (patient-litigant exception), 5552 (waiver); Saltzburg, *supra* note 109, at 622-25.

180. See *supra* notes 177-79.

181. For a general discussion of recovered memory concerns, see *supra* notes 11, 164, 169. The debate has spread to legal literature. See generally Larry B. Spikes & Angela L. Rud, "Restored Recollections": Claims Based on Repressed Memories of Abuse, 62 DEF. COUNS. J. 89 (1995); Christina Bannon, Comment, *Recovered Memories of Childhood Sexual Abuse: Should the Courts Get Involved When Mental Health Professionals Disagree?*, 26 ARIZ. ST. L.J. 835 (1994); Matthew J. Eisenberg, Comment, *Recovered Memories of Childhood Sexual Abuse: The Admissibility Question*, 68 TEMP. L. REV. 249 (1995); Monica L. Hayes, Note, *The Necessity of Memory Experts for the Defense in Prosecutions for Child Sexual Abuse Based upon Repressed Memories*, 32 AM. CRIM. L. REV. 69 (1994); Joy Lazo, Comment, *True or False: Expert Testimony on Repressed Memory*, 28 LOY. L.A. L. REV. 1345 (1995); Julie M. Murray, Comment, *Repression, Memory, and Suggestibility: A Call for Limitations on the Admissibility of Repressed Memory in Sexual Abuse Trials*, 66 U. COLO. L. REV. 477 (1995); Colette M. Smith, Comment, *Recovered Memories of Alleged Sexual Abuse: An Analysis of the Theory of Repressed Memories Under the Washington Rules of Evidence*, 18 SEATTLE U. L. REV. 51 (1994). Some commentators have questioned whether testimony based on recovered memories should be admitted into evidence at all. See, e.g., *State v. Hungerford*, Nos. 94-S-045 to 94-S-047, 93-S-1734 to 93-S-1936, 1995 WL

to ignore this debate by allowing patients who bring recovered memory lawsuits to keep the origin and ancestry of their memories from the jury. Treatment rooms must be exposed to the jury's scrutiny when evidence of recovered memories is presented. By testifying about recovered memories, the plaintiff must waive the psychotherapy-patient privilege to permit the court to explore how the memories were restored.

VII. IMPACT OF TREATMENT HYPNOSIS ON TESTIMONIAL COMPETENCE

Hypnosis is widely used in the treatment of multiple personality disorder.¹⁸² Many of the uses do not involve memory work. Hypnosis, for ex-

378571, at *1-3 (N.H. Super. Ct. 1995). Others would admit such testimony only if the judge, after conducting a pretrial hearing into the circumstances surrounding recovery of the memories, determines that the testimony is reliable. See, e.g., Eisenberg, *supra*, at 258-59; Murray, *supra*, at 517. Still others would leave the determination of whether or not to accept such testimony to the jury, but would give the jury the benefit of expert testimony about the memory hazards. See, e.g., Hayes, *supra*, at 79. This Article will not address the various proposals other than to say that courts should think long and hard before deciding to exclude testimony based on recovered memory. Such a decision would disqualify virtually all witnesses with MPD from testifying about traumas they have endured. In *Thornton v. State*, an Indiana court declined to exclude such testimony. 653 N.E.2d 493, 496-97 (Ind. Ct. App. 1995). The court ruled that undergoing memory integration therapy did not provide an adequate reason for excluding a multiple's testimony. *Id.*

182. Hypnosis is used in the psychotherapy of multiple personality disorder for: (a) developing therapeutic rapport, (b) accessing personality states, (c) managing affect and behavior, (d) penetrating and dismantling amnesic barriers, (e) mediating and resolving internal conflicts between identities, (f) defusing dangerous and self-destructive behaviors, (g) facilitating abreactive work, (h) achieving personality integration, and (i) developing nondissociative coping skills. For a discussion of these and other uses, see, e.g., BLISS, *supra* note 4, at 36-65, 193-230; BLOCH, *supra* note 22, at 73-76; PUTNAM, *supra* note 1, at 218-52; Richard P. Kluft, *Using Hypnotic Inquiry Protocols to Monitor Treatment Progress and Stability in Multiple Personality Disorder*, 28 AM. J. CLINICAL HYPNOSIS 63, 65 (1985); Richard P. Kluft, *Varieties of Hypnotic Interventions in the Treatment of Multiple Personality Disorder*, in 24 AM. J. CLINICAL HYPNOSIS 230 (1982); Miller, *Hypnotherapy in a Case of Dissociated Incest*, 34 INT'L CLINICAL & EXPERIMENTAL HYPNOSIS 13 (1986). In addition, hypnosis can help many people to relax, manage pain, reduce stress, strengthen the ego, develop self-esteem, build motivation, and desensitize phobias. See, e.g., D. CORYDON HAMMOND, *HANDBOOK OF HYPNOTIC SUGGESTIONS AND METAPHORS* 1 (D. Corydon Hammond ed., 1990); Fred H. Frankel, *Significant Developments in Medical Hypnosis During the Past 25 Years*, 35 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 231 (1987); Erika Fromm, *Significant Developments in Clinical Hypnosis During the Past 25 Years*, 35 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 215 (1987). Many leading therapists believe that hypnosis is

ample, is sometimes employed to manage suicidal behavior by using hypnotic suggestion to put self-destructive states to sleep until the next session.¹⁸³ Hypnotic applications that do not involve memory work should not trouble courts, because such applications have no power to change memory.¹⁸⁴ However, one use for hypnosis in MPD treatment is the uncovering and abreacting of memories.¹⁸⁵

There are important reasons why hypnosis is used for memory work with multiples.¹⁸⁶ The reason multiples lack conscious recall of their traumatic experiences is that they were in a dissociative/self-hypnotic state when the memories were stored.¹⁸⁷ Hypnosis returns them to a state corresponding to the original one. Memories are state-dependent in the sense that information encoded while a person is in a particular state is best remembered when the person is again in a similar state.¹⁸⁸ This mismatch in states explains why people who are depressed cannot remember the good things that happen to them. This also explains why therapists sometimes think that multiples need to undergo controlled or

indispensable to the treatment of MPD. PUTNAM, *supra* note 1, at 227.

183. See, e.g., BLOCH, *supra* note 22, at 74.

184. See, e.g., *McGlaufflin v. State*, 857 P.2d 366, 379 (Alaska Ct. App. 1993) (finding rule disqualifying previously hypnotized witnesses inapplicable to witness who consulted a hypnotherapist for weight loss).

185. "Abreaction" refers to the emotional reliving of affect-laden experiences. See, e.g., BLOCH, *supra* note 22, at 60. This process is an integral part of the psychotherapy of trauma-induced disorders. See, e.g., BRIERE, *supra* note 6, at 85-88. Abreaction has to occur in order to drain traumatic memories of their emotional force so that they can be metabolized and assimilated. Hypnosis intensifies the patient's emotional discharge and brings about a faster and more lasting and durable recovery. See, e.g., BLISS, *supra* note 4, 78-91.

186. See, e.g., Kanovitz, *supra* note 2, at 1212-16.

187. See *supra* notes 53-57, 97-104 and accompanying text.

188. See, e.g., James M. Swanson & Marcel Kinsbourne, *State-Dependent Learning and Retrieval: Methodological Cautions and Theoretical Considerations*, in FUNCTIONAL DISORDERS OF MEMORY 275 (John F. Kihlstrom & Frederick H. Evans eds., 1979); Spiegel, *Victims of Sexual Abuse*, *supra* note 41, at 399. The following passage summarizes contemporary assumptions about the conditions necessary to stimulate the retrieval mechanisms of memory:

Today, most theorists assume that how well something is remembered depends not only on what that something is, or how it was encoded, but also on the circumstances that surround its retrieval. Accordingly, remembering is now conceptualized as a joint product or interaction between information that has been stored in the past and information that is present in the cognitive environment of the rememberer Studies showing that memory performance depends on the similarity or match between drug or mood states at encoding and retrieval thus square with this interactive view of remembering, and thereby strengthen its appeal.

Janet M. Eich, *Theoretical Issues in State Dependent Memory*, in ORGANIZATION OF MEMORY 331, 334 (Endel Tulvig & Wayne Donaldson eds., 1972).

spontaneous hypnosis to remember traumatic experiences.¹⁸⁹ Resumption of a state that matches the patient's state when the memories were encoded supplies the associative network needed to stimulate retrieval mechanisms of memory.¹⁹⁰ As Dr. Eugene Bliss succinctly put it, "The path into the cave is the path leading out."¹⁹¹

Hypnosis offers a second advantage in the psychotherapy of MPD—control. The penetration of amnesic barriers exposes the patient to the risks of being flooded and overwhelmed by intensely affect-laden memories. With hypnosis, the patient's dissociative memory barriers can be dismantled gradually, in a controlled manner, and at a pace the patient can tolerate.¹⁹² When the patient's limits of coping with trauma-related recall are reached, the patient can be brought out of hypnosis with permission to remember "only as much as of this session as you can manage."¹⁹³ Techniques also exist for modulating the intensity of memories by providing the patient with emotional distance from the event.¹⁹⁴

Hypnotic memory work is certain to provide a challenge to a multiple's testimonial competence. When hypnosis first became a legal issue, courts took the position that pretrial hypnosis affected a witness's credibility, not his competence.¹⁹⁵ During the 1980s, however, a majority of courts

189. See *supra* notes 53-57, 97-101 and accompanying text.

190. See BLISS, *supra* note 4, at 112-14; HILGARD, *supra* note 38, at 244-45; Kanovitz, *supra* note 2, at 1214-15; Spiegel, *Hypnosis*, *supra* note 51, at 915; Spiegel, *Victims of Sexual Abuse*, *supra* note 41, at 300.

191. See BLISS, *supra* note 4, at 112.

192. See BLOCH, *supra* note 22, at 74-75; PUTNAM, *supra* note 1, at 131-32; Kanovitz, *supra* note 2, at 1215-16; Spiegel, *Hypnosis*, *supra* note 51, at 914-16; Spiegel, *Victims of Sexual Abuse*, *supra* note 41, at 300-02.

193. See BLOCH, *supra* note 22, at 75.

194. See, e.g., PUTNAM, *supra* note 1, at 231-34 (listing several healing techniques); Spiegel, *Hypnosis*, *supra* note 51, at 914-16. The patient, for example, can be told to project the memory on an imaginary television screen so that the patient can watch the experience from a safe distance. Spiegel, *Hypnosis*, *supra* note 51, at 914-16.

195. See, e.g., *United States v. Awkard*, 597 F.2d 667, 669 (9th Cir.) ("The fact of hypnosis, if disclosed to the jury, may affect the credibility of evidence, but not its admissibility."), *cert. denied*, 444 U.S. 885 (1979); *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506, 509-10 (9th Cir. 1974) (finding that post-hypnotic testimony is not "inherently untrustworthy"); *Creamer v. State*, 205 S.E.2d 240, 241-42 (Ga. 1974) (stating that hypnosis prior to testimony does not render a witness incompetent); *State v. McQueen*, 244 S.E.2d 414, 427-28 (N.C. 1978) (deciding that hypnosis affects credibility rather than competency of a witness), *overruled by State v. Peoples*, 319 S.E.2d 177, 188 (N.C. 1984) ("[H]ypnotically refreshed testimony is inadmissible in judicial proceedings."); *State v. Jorgensen*, 492 P.2d 312, 315-16 (Or. Ct. App. 1971) (refusing to

switched gears. These changes came about because of findings in a number of laboratory research studies. These studies questioned whether hypnosis was able to improve the memory of eyewitnesses and suggested that its use for this purpose might make testimony unreliable.¹⁹⁶ Alarmed by these reports,¹⁹⁷ a majority of courts did an about face and held that witnesses who had undergone hypnosis were incompetent to testify, except as to matters they demonstrably recalled before the session began.¹⁹⁸

exclude testimony following hypnosis and psychiatric examinations).

196. Some studies have found that hypnosis improves memory performance. See, e.g., Gordon L. Stager & Richard M. Lundy, *Hypnosis and the Learning and Recall of Visually Presented Material*, 33 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 27 (1985). However, most studies have been less favorable. See, e.g., Mathew H. Erdelyi, *Hyperamnesia: The Effect of Hypnosis, Fantasy, and Concentration*, in HYPNOSIS AND MEMORY 64 (Helen M. Pettinati ed., 1988) (finding that hypnosis increases memory productivity at the expense of accuracy by making the subject more willing to guess); William H. Putnam, *Hypnosis and Distortions in Eyewitness Memory*, 26 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 437, 444 (1979) (finding that hypnotized subjects are more vulnerable than waking state subjects to leading questions); Sheehan, *supra* note 173, at 95 (finding that hypnosis artificially increases confidence in memory accuracy); Graham F. Wagstaff, *Hypnosis and the Law: The Role of Induction in Witness Recall*, in MODERN TRENDS IN HYPNOSIS 345, 346 (David Waxman et al. eds., 1985) (finding that hypnosis has no advantage over waking state concentration for subjects who have normally functioning memories); Mark Zelig & William B. Beidleman, *The Investigative Use of Hypnosis: A Word of Caution*, 29 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 401 (1981) (finding that hypnotized subjects are more likely to succumb to leading questions).

197. Dr. Bernard Diamond and Dr. Martin Orne were instrumental in shaping the attitude of the courts toward hypnosis. Each wrote a number of highly influential articles interpreting hypnosis laboratory research findings for the courts. See generally Bernard L. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313 (1982) (characterizing using pretrial hypnosis to refresh a witness's memory as being "tantamount to . . . fabrication of evidence"); Martin T. Orne et al., *Hypnotically Induced Testimony*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 171 (Gary L. Wells & Elizabeth F. Loftus eds., 1984) (stating that hypnosis may instill a false sense of confidence in memory accuracy, making the witness difficult to cross-examine). Their conclusions may have been, and probably were, slightly bleaker than data from available scientific studies warranted. See 27 WRIGHT & GRAHAM, *supra* note 109, § 6011, at 143-44; Kanovitz, *supra* note 2, at 1234 n.212, 1253 n.296.

198. See *Contreras v. State*, 718 P.2d 129, 139 (Alaska 1986) (admitting testimony only regarding facts known prior to hypnosis); *State v. Mena*, 624 P.2d 1274, 1279-80 (Ariz. 1981) (en banc) ("[T]estimony of witnesses which has been tainted by hypnosis should be excluded in criminal cases."), *modified*, *Arizona ex rel. Collins v. Superior Court*, 644 P.2d 1266, 1276 (Ariz. 1982) (en banc) (finding that the rule in *Mena* should not be given retroactive effect); *People v. Shirley*, 723 P.2d 1354, 1365-66 (Cal.) (en banc) (refusing to adopt "safeguards" as a means to make hypnotically refreshed memories admissible), *cert. denied*, 459 U.S. 860 (1982); *Stokes v. State*, 548 So. 2d 188, 196 (Fla. 1989) (stating that witness may not testify as to facts remembered after hypnosis); *People v. Zayas*, 546 N.E.2d 513, 514 (Ill. 1989) ("[A] witness

Courts have rarely had occasion to consider the impact of therapeutic hypnosis on testimony. In the few cases where this issue has arisen, however, courts have generally refused to attach special significance to the fact that the hypnosis was undertaken for treatment.¹⁹⁹ Neverthe-

other than the defendant himself may not offer testimony to the extent that it is enhanced through hypnosis."); *State v. Haislip*, 701 P.2d 909, 923-26 (Kan.) (discussing dangers of post-hypnotic memories and finding them inadmissible as a result), *cert. denied*, 474 U.S. 1022 (1985); *State v. Collins*, 464 A.2d 1028, 1044 (Md. 1983) (using *Frye* test to find "hypnotically enhanced testimony" inadmissible); *People v. Gonzales*, 329 N.W.2d 743, 748 (Mich. 1982) (holding that hypnosis makes the testimony unreliable and hinders defendants' right to cross-examination); *State v. Mack*, 292 N.W.2d 764, 772 (Minn. 1980) (refusing to admit post-hypnotic testimony); *Alsbach v. Bader*, 700 S.W.2d 823, 830 (Mo. 1985) (en banc) (finding that hypnotically refreshed memories lack reliability); *State v. Palmer*, 313 N.W.2d 648, 654-55 (Neb. 1981) (refusing to analyze post-hypnotic testimony on a case-by-case basis); *People v. Hughes*, 453 N.E.2d 484, 489 (N.Y. 1983) ("[H]ypnosis is an inherently suggestive procedure."); *State v. Peoples*, 319 S.E.2d 177, 187 (N.C. 1984) (noting that "hypnotically refreshed testimony is simply too unreliable to be used as evidence"); *Commonwealth v. Nazarovitch*, 436 A.2d 170, 178 (Pa. 1981) (stating that "hypnotically-refreshed testimony" has not yet been shown to be reliable).

A substantial minority of courts took a closer look at the hypnosis laboratory research findings and determined that the results were not as gloomy as a majority of the courts believed. These courts adopted an intermediate position. The New Jersey Supreme Court took the lead in *State v. Hurd*, 432 A.2d 86 (N.J. 1981). Recognizing that hypnosis was more appropriate for certain types of memory loss than others, the New Jersey Supreme Court ruled that witnesses could testify about memories retrieved through hypnosis if hypnosis was appropriate for the type of memory loss involved and the session was conducted in conformity with a rigid set of procedures designed to safeguard against guiding the witness's recall. *Id.* at 94-95. The New Jersey approach is now followed in several other jurisdictions. *See, e.g.*, *House v. State*, 445 So. 2d 815, 824 (Miss. 1984); *State v. Beachum*, 643 P.2d 246, 254 (N.M. Ct. App. 1981), *cert. quashed by* 644 P.2d 1040 (1982); *State v. Weston*, 475 N.E.2d 805, 813 (Ohio Ct. App. 1984). A few courts have modified the *Hurd* approach by considering factors besides compliance with procedural safeguards in deciding whether hypnotically enhanced testimony is sufficiently reliable to be admitted in a legal proceedings. *See, e.g.*, *People v. Romero*, 745 P.2d 1003, 1017 (Colo. 1987) (en banc), *cert. denied*, 485 U.S. 990 (1988); *State v. Iwakiri*, 682 P.2d 571, 578 (Idaho 1984). Finally, a few courts continue to follow the original position, that hypnosis only affects the witness's credibility and not competence to testify. *See, e.g.*, *Pearson v. State*, 441 N.E.2d 468, 473 (Ind. 1982), *post conviction relief granted in part*, 543 N.E.2d 1141 (1989); *State v. Wren*, 425 So. 2d 756, 759 (La. 1983); *State v. Brown*, 337 N.W.2d 138, 151 (N.D. 1983); *Chapman v. State*, 638 P.2d 1280, 1284-85 (Wyo. 1982).

199. *See, e.g.*, *Borawick v. Shay*, 842 F. Supp. 1501, 1508 (D. Conn. 1994) (holding testimony in regard to hypnosis inadmissible because therapist not qualified), *aff'd*, 68 F.3d 597 (2d Cir. 1995); *McGlaufflin v. State*, 857 P.2d 366, 380 (Alaska Ct. App. 1993) (holding that rule excluding hypnotized witness testimony applies both to forensic

less, there are three reasons why courts should not disqualify multiples from testifying on the basis that they have experienced treatment hypnosis. First, hypnosis memory researchers have never tested the effectiveness of hypnosis on patients suffering from dissociative amnesias. Unfavorable findings in hypnosis experiments have come from studies involving subjects with normally functioning memories.²⁰⁰ The American Medical Association Counsel on Scientific Affairs has cautioned that these studies do not provide definitive answers about the workings of hypnosis on subjects who suffer from psychological memory blocks.²⁰¹

Second, the standard justification for disqualifying lay witnesses who have undergone hypnosis has been the *Frye* rule.²⁰² Courts took nega-

and therapeutic hypnosis); *State v. Moreno*, 709 P.2d 103, 105 (Haw. 1985) (holding that witness may only testify as to matter brought out in hypnosis if those matters recollected prior to hypnosis); *Tardi v. Henry*, 571 N.E.2d 1020, 1026 (Ill. App. Ct.) (holding that hypnotically induced testimony is *per se* inadmissible), *appeal denied*, 580 N.E.2d 136 (Ill. 1991); *People v. Reese*, 385 N.W.2d 722, 724 (Mich. Ct. App. 1986) (holding that testimony from therapeutic and forensic hypnosis inadmissible); *State v. Grimmet*, 459 N.W.2d 515, 518 (Minn. Ct. App. 1990) (holding that witness should be allowed to testify as to matters recalled prior to hypnosis); *People v. Schreiner*, 573 N.E.2d 552, 556 (N.Y. 1991) (holding that hypnotically induced testimony not admissible because not generally accepted in scientific community); *West v. Howard*, 601 N.E.2d 528, 533-34 (Ohio Ct. App. 1991) (holding plaintiff's testimony inadmissible as it was refreshed by self-hypnosis), *jurisdictional motion overruled by* 585 N.E.2d 835 (1992). *But see* *Landry v. Bill Garrett Chevrolet, Inc.*, 430 So. 2d 1051, 1056 (La. Ct. App.) (holding that hypnosis should not be excluded as a matter of law), *rev'd*, 434 So. 2d 1103 (La. 1983); *State v. Varela*, 817 P.2d 731, 733-34 (N.M. Ct. App.) (allowing hypnotically refreshed testimony if *Hurd* safeguards are met), *cert. denied*, 816 P.2d 509 (N.M. 1991).

200. Kanovitz, *supra* note 2, at 1221-23.

201. See Council on Scientific Affairs, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 J. AM. MED. ASS'N 1918, 1921-22 (1985).

There are many reasons why hypnosis is likely to be more effective in overcoming dissociative amnesias than in improving eyewitness recall. See Kanovitz, *supra* note 2, at 1224-34. Even if this cannot be demonstrated, however, the legal system should not disqualify patients who have undergone hypnotic treatments. Such disqualification will damage the practice of psychotherapy. See *id.* at 1252-62. The mental health field has not been blessed with refined tools for performing memory work. *Id.* at 1243-45. In nonhypnotic therapies, repressed memories are often restored through free associations, dream interpretation, and sometimes outright suggestion. *Id.* at 1243-45. These techniques are no more certain to produce reliable recall than hypnosis.

202. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). *Frye* involved the admissibility of expert opinion based on interpretation of the results of a polygraph test. *Id.* at 1013. The court of appeals refused to admit the testimony, stating that when expert testimony is based on a scientific gadget, technique, or device, the "thing" from which the expert testimony is deduced "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014. Despite its many shortcomings, the *Frye* test gained rapid acceptance and became the dominant standard for the admission of scientific evidence for more than a half century. For a comprehensive analysis of the *Frye* rule, see generally Paul C.

tive comments in several published studies as evidence that hypnosis had not gained sufficient acceptance in the scientific community as a reliable method of restoring memory.²⁰³ It is unclear whether excluding the testimony of lay witnesses was ever an appropriate application of *Frye*.²⁰⁴ Even if this application was appropriate a decade ago, however, courts in jurisdictions that have adopted the Federal Rules of Evidence must reconsider using *Frye* to exclude witnesses. Rule 702²⁰⁵ supersedes the *Frye* test,²⁰⁶ requiring courts to re-examine rules disqualifying lay witnesses who have undergone hypnosis.²⁰⁷

Third, and most important, disqualifying multiples who have undergone formal trance inductions as part of their treatment accomplishes nothing. It will not get hypnosis out of treatment rooms because multiple personality is a disorder of self-hypnotism.²⁰⁸ Multiples often spontaneously enter into a trance while undergoing treatment.²⁰⁹ The only consequence

Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980) (discussing the application of the *Frye* test in determining the admissibility of scientific evidence).

203. See, e.g., *Contreras v. State* 718 P.2d 129, 136 (Alaska 1986) (stating that "the 'science' of hypnosis is far too underdeveloped to qualify under the *Frye* standard"); *People v. Shirley*, 723 P.2d 1354, 1377-80 (Cal. 1982) (discussing expert criticism of hypnotically refreshed memories); *State v. Peoples*, 319 S.E.2d 177, 188 (N.C. 1984) (noting that "hypnosis has not reached a level of scientific acceptance which justifies its use for courtroom purposes"); *Zani v. State*, 758 S.W.2d 233, 237-39, 241-42 (Tex. Crim. App. 1988) (listing variations of expert analysis of *Frye* standard in relation to hypnosis); *Hall v. Commonwealth*, 403 S.E.2d 362, 369 (Va. Ct. App. 1984) (relying on one expert's testimony that post-hypnotic memories are unreliable).

204. For an insightful analysis of why excluding hypnotically enhanced testimony on the basis of *Frye* is a misapplication of the *Frye* rule, see WRIGHT & GRAHAM, *supra* note 109, § 6011, at 132-47.

205. Rule 702 of the Federal Rules of Evidence provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. § 702.

206. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2799 (1993). While the Supreme Court's *Daubert* holding constitutes binding authority only on federal courts, it operates as persuasive authority in state courts, particularly in those with rules of evidence patterned after the Federal Rules of Evidence.

207. See, e.g., *Rowland v. Commonwealth*, 901 S.W.2d 871, 873 (Ky. 1995); WRIGHT & GRAHAM, *supra* note 109, § 6011, at 132-47 (discussing how the *Frye* test is superseded by the Federal Rules of Evidence).

208. *Supra* notes 48-62, 139-53 and accompanying text.

209. See, e.g., BLISS, *supra* note 4, at 69-78; PUTNAM, *supra* note 1, at 219-20 (citing

of disqualifying multiples who experience formal trance inductions would be to reduce the effectiveness of therapy by discouraging a technique that many specialists believe is indispensable to proper care of this difficult patient population.²¹⁰ The admission of testimony by witnesses with this disorder will raise credibility concerns.²¹¹ Treatment hypnosis will aggravate them. Yet, barring mentally disturbed witnesses from testifying because they have undergone psychologically-indicated treatment is overly harsh. Jurors can be educated about the possible memory hazards from the treatments through expert testimony and cautionary instructions.²¹²

numerous studies of spontaneous trance states).

210. See *supra* notes 183-93 and accompanying text; see also *supra* note 181 (providing sources that discuss this issue).

211. See *supra* parts V, VI.

212. In *Rock v. Arkansas*, 483 U.S. 44 (1987), the Supreme Court ruled that hypnotically enhanced testimony is not so resistant to adversarial testing that a criminal defendant who has undergone hypnotic memory enhancement can be denied the right to testify on his own behalf. *Id.* at 61-62. The Court pointed out the adversary system has mechanisms other than disqualifying witnesses to protect juries against the danger of overvaluing hypnotically enhanced testimony. *Id.* at 60-61. Jurors can be "educated to the risks of hypnosis through expert testimony and cautionary instructions." *Id.* at 61. The availability of these mechanisms made wholesale exclusion of a defendant's hypnotically enhanced testimony improper. *Id.* While the actual holding in *Rock* is narrow, resting on the right of a criminal defendant to testify in his own behalf, the Supreme Court's expression of confidence in the ability of the adversary system to survive the introduction of hypnotically enhanced testimony is pertinent here as well. See *id.* at 60-62. Added protection can be provided by requiring independent corroboration as a condition to admitting memories recovered during hypnotherapy sessions. See, e.g., *Borawick v. Shay*, 842 F. Supp. 1501, 1505 (D. Conn. 1994) (stating that concerns regarding hypnotically refreshed memories can be alleviated by instituting certain safeguards), *aff'd*, 68 F.3d 597 (2d Cir. 1995).

A Georgia court recently confronted a closely related issue in *Dorsey v. State*, 426 S.E.2d 224 (Ga. Ct. App. 1992). The court was concerned with the impact of self-hypnotism on a multiple's competence to testify. *Id.* at 226-28. The defense argued that dissociation involves self-hypnotism and that a witness who needs to dissociate (i.e., switch identities) in order to testify was incompetent because the witness would, in effect, be testifying in an autohypnotic state. *Id.* at 226-27. While the court was confused about the relationship between dissociation and self-hypnotism, the court nevertheless came to the right conclusion. The court held that the fact that the "victim's perceptions in a dissociative state might sometimes be incomplete or distorted was a proper subject of argument to the jury regarding why it should discount her testimony, but . . . did not render the victim incompetent to testify." *Id.* at 228.

While the *Dorsey* court was concerned with the impact of self-hypnotism, more precisely self-hypnotism occurring on the witness stand, disqualifying witnesses who undergo formal treatment inductions while accepting witnesses who spend a significant part of their lives in self-hypnotic trance states would be hard to defend. See *supra* notes 120-54, 199-211 and accompanying text. The memory hazards from hypnosis do not materialize when a hypnotist counts to 10. The hazards inhere in the hypnotic state and in the personality characteristics of subjects who are highly hypnotiz-

CONCLUSION

A variety of problems associated with MPD can impair performance as a witness. The problems appear so diverse and complicated that judges may be tempted to wash their hands of multiples and run. This would be a mistake. MPD is strongly linked with childhood trauma. Despite their many problems, multiples will often have much that is accurate, meaningful, and important to tell juries.

With rare exceptions, judges should admit multiples' testimony. Nevertheless, they should do so fully aware of the testimony's potential shortcomings and of the difficulty the defense will have in cross-examining the witness. This Article suggests three ways to maximize a multiple's testimony. First, to whatever extent the witness's illness may allow, judges should hold multiples to the same standards and treat them in the same manner as other witnesses. This approach is likely to improve their testimony. Second, judges should not allow multiples to shift the entire burden of coping with their handicaps onto their adversaries. The burden must be shared. Dividing the burden will, at times, require multiples to disclose intensely private information contained in their treatment records. Multiples and their therapists will need to weigh this risk and its implications for the treatment before deciding to make accusations in a legal forum. Finally, and most important, judges must never forget, when dealing with a multiple, that there is only one person on the witness stand. Trying to see the world through the eyes of a multiple will be disastrous for the legal system.

able. *See supra* notes 139-54, 164-70 and accompanying text. Disqualifying multiples who have experienced treatment applications of hypnosis will not eliminate these problems. *See supra* notes 164-70. Consequently, courts should treat the impact of hypnosis on a multiple's recall—whether spontaneous or orchestrated by the therapist—as one of the many factors jurors will need to weigh in evaluating a multiple's credibility.

